

Supreme Court, U. S.  
F I L E D

SEP 16 1977

MICHAEL RODAK, JR., CLERK

**APPENDIX**

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**IN THE**  
**Supreme Court of the United States**

**OCTOBER TERM, 1977**

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No. **77 - 428**

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**SHEARN MOODY, JR.,**

*Petitioner,*

**VS.**

**STATE OF ALABAMA, EX. REL**  
**CHARLES H. PAYNE, COMMISSIONER OF**  
**INSURANCE AND RECEIVER OF EMPIRE**  
**LIFE INSURANCE CO., OF AMERICA**

*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI**  
**TO THE SUPREME COURT OF THE**  
**STATE OF ALABAMA**

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THE STATE OF ALABAMA — JUDICIAL DEPARTMENT  
THE SUPREME COURT OF ALABAMA  
OCTOBER TERM, 1976-77

Shearn Moody, Jr.

S. C. 931:1268:1270

v.

State of Alabama,  
ex rel. Charles H. Payne,  
Commissioner of Insurance and Receiver of  
Empire Life Insurance Co. of America  
Appeal from Jefferson Circuit Court

BEATTY, JUSTICE

This is an appeal from an adjudication of insolvency, an order of liquidation and approval of a reinsurance agreement as ordered by the Circuit Court of Jefferson County. We affirm.

The material facts of this case are reported in *Moody v. State ex rel. Payne, Commissioner*, ..... Ala. ...., 329 So.2d 73 (1976), thus only a brief factual review is necessary here.

On April 13, 1972 the Commissioner of Insurance of the State of Alabama instituted a receivership proceeding in the Circuit Court of Jefferson County against Empire Life Insurance Company, an Alabama corporation. The trial court placed Empire in receivership on June 29, 1972, appointed the Commissioner as receiver, and on September 12, 1973 entered an order authorizing him to solicit offers from other insurance companies for the reinsurance of Empire. Later, in January, 1974 the receiver petitioned the Court for an order of liquidation of Empire and for approval of a reinsurance agreement presented by Protective Life Insurance Company, which later

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intervened. Shearn Moody, chairman of the board and the largest single stockholder of Empire, intervened. After a hearing on the receiver's petition, the relief requested was granted on June 14, 1974.

On October 15, 1974, Moody filed a motion, later amended, under Rule 60(b), ARCP, to introduce new evidence establishing the solvency of Empire as of the date of the liquidation decree. This motion was overruled on November 22, 1974. Subsequently, the receiver petitioned for approval of an amendment to the reinsurance agreement. This petition was granted over Moody's objections, and on April 10, 1975, the trial court by decree authorized the receiver to execute the amendment.

Essentially, Moody raises three issues: (1) that the trial court erred in denying Moody's 60(b) motion; (2) that policyholders of Empire were discriminated against as a result of the trial judge's reinsurance order; and (3) that the trial court abused its discretion in ordering liquidation and reinsurance. We shall take up the issues presented *seriatim*.

Moody contends that the trial court erred in denying his Rule 60(b) motion for relief from the decree of June 14, 1974. Evidence he obtained from a post-judgment appraisal of one of Empire's assets, an interest in the Libbie Shearn Moody Trust, establishing an asset value of approximately \$14,000,000 instead of the \$4,250,000 value given it by the Commissioner, he asserts, justified a new hearing. The appraisal referred to in his motion was made by Mr. Harold Crandall, who had testified as an expert witness for Moody at the April, 1974 hearing. Although the Crandall appraisal was referred to in the motion as Exhibit B, it was neither attached to the motion nor sub-

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mitted to the Court. Indeed, on November 15, 1974 when Moody's attorneys argued the motion, they submitted a different appraisal, one made by Dr. Joseph Trosper. Trosper's appraisal expressly recited that its author had not been contacted by Moody until October 18, 1974, three days after Moody's Rule 60(b) motion was filed. Moody did not explain why this appraisal could not have been either the subject of his motion or procured prior to the April hearing.

Rule 60(b)(2), ARCP, authorizes relief from a final judgment for:

*... newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial. . . . (emphasis supplied.)*

Was appellant's evidence "new" or "newly discovered?" There can be no Rule 60(b)(2) relief for evidence which has come into existence after the trial is over simply because such a procedure would allow all trials perpetual life. "Newly discovered evidence" means evidence in existence at the time of trial of which the movant was unaware. *Prostrollo v. Univ. of S. Dak.*, 63 F.R.D. 9 (D.C.S.D. 1974). And for a litigant to obtain a new trial on the ground of newly discovered evidence, it must appear that his reasonable diligence before trial would not have revealed this evidence which he failed to discover. *Plisco v. Union Ry Co.*, 379 F.2d 15, 16 (CCA 2nd 1967). Hence, the trial court did not abuse its discretion in denying Moody's motion since this evidence was not even created until after October 18, 1974, over four months after the decree ordering liquidation and approving the reinsurance treaty. Any



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attempt by Moody to explain away his unawareness would have been inapt in those circumstances.

Appellee contends that Moody's assertion of discrimination against the policyholders fails because Moody did not raise this issue properly in the trial court, that is, that discrimination was raised for the first time in Moody's objections to the trial court's decree authorizing execution of the agreement to effectuate the reinsurance treaty, issued on April 10, 1975, almost a year after the trial court had approved the reinsurance agreement. This position overlooks the fact that the trial court, trying the case under equity rules, expressly gave the parties a standing objection to "every bit of evidence" and "to every ruling." In this posture we consider that the objection was timely made. Next, the appellee maintains that the trial court was not required to allow the objection of discrimination because Moody himself was found by the trial court to be in open contempt for violating the injunction referred to in ..... Ala. ...., 329 So.2d 73, 10 ABR 543, 546-554 (1976). While it may be true as a general proposition that "[a] party in contempt is not entitled to insist upon a hearing or trial of the case out of which the contempt arose until he first purges himself of the contempt," *Wilkinson v. McCall*, 247 Ala. 225, 23 So.2d 577 (1945), nevertheless for due process reasons "[t]he power to deny a hearing to a person in contempt does not include the power to refuse to such person in contempt the right to defend in the main case on the merits." *McCollum v. Birmingham Post Co.*, 259 Ala. 88, 65 So.2d 689 (1953). By objecting to discrimination against policyholders, Moody appears to have been doing just that, defending such

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interest as he claims in the main case on the merits of the reinsurance agreement.

Appellee's assert further that Moody has no standing to complain of the trial court's approval of the reinsurance agreement. On the other hand, Moody contends that his position as the largest single stockholder of Empire, and as a creditor of Empire, gave him the standing to challenge the agreement which, he contends, "deprives stockholders of their entire equity without providing them with any benefits in return . . . and which deprives creditors of their contractual rights with Empire."

Of course Moody must have some direct interest in the wrongs he alleges, otherwise he has no standing to complain. *Cf. Peterson v. Hamilton*, 286 Ala. 49, 237 So.2d 100 (1970); *U.S. v. 936.71 Acres of Land*, 418 F.2d 551 (CCA 5th 1969). The record does not reveal that prior to this appeal Moody has ever claimed to be a policyholder of Empire. His claim to be a creditor is based upon a debenture bond which, he asserts, he received from Empire and which is alluded to as part of an exhibit introduced at the 1972 hearing, and a guaranty of an indebtedness of Credit Factoring, Inc. made by Empire to W. L. Moody and Company, Bankers, of which Moody contends he is sole owner. But Moody never did plead his interest as a creditor prior to the April, 1974 hearing when liquidation of Empire was ordered and approval of the reinsurance agreement was granted by the trial court, and it is now too late to bring to the trial court's attention any such claimed interest. Had he properly asserted this standing, nevertheless the reinsurance agreement does not appear discriminatory. The policyholders, some forty thousand in number, result in part from acquisitions and mergers

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of many insurance companies with Empire, and they represent many different insurance plans. The reinsurance plan contains provisions which accommodate the various policy distinctions. To be sure, all of the policies are not alike, and the law does not require that they be treated alike. Different classifications based upon substantial differences are not unlawful discrimination. *State v. Pure Oil Co.*, 256 Ala. 534, 55 So.2d 843 (1951); *Carpenter v. Pac. Mut. Life Ins. Co.*, 10 Cal.2d 307, 74 P.2d 761 (1937); affirmed *Neblett v. Carpenter*, 305 U.S. 297, 59 S.Ct. 170, 83 L.Ed. 182 (1938).

Approximately one-half of the Empire policyholders reside in Texas, and most of Empire's physical assets are located in that state. From an order issued by the 53rd Judicial District Court of Texas ordering the Texas ancillary receiver to cooperate in the execution of the reinsurance agreement, Moody appealed to the Court of Civil Appeals of Texas, claiming unlawful discrimination among Empire's policyholders and creditors. Citing the voluminous testimony relating to the fairness of the agreement and the special provisions formulated to produce equitable benefits for each group, that court found no discrimination. We agree. Indeed, it is difficult to imagine any other course, since the policyholders before and after the agreement, had only the right to file a claim against the receiver of the insolvent company for the amount of the cash value of the policies. *Carpenter v. Pac. Mut. Life Ins. Co.*, supra. See also *Fletcher v. Tuscaloosa Fed. Sav. & Loan*, 294 Ala. 173, 314 So.2d 51 (1975).

The record in this case reveals that Empire Life Insurance Company of America was in precarious financial condition some

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three years before it was placed in receivership. A panel composed of the insurance commissioners of five states attempted to effect rehabilitation without receivership, and although some improvement resulted, an examination conducted by the insurance departments of Texas, Alabama and South Dakota found Empire insolvent in excess of six million dollars and impaired in excess of ten million dollars. It was then that formal receivership proceedings were commenced and the then commissioner of insurance of Alabama was appointed receiver. Because of the six million dollar insolvency, the trial court restricted payments of cash values of policies to fifty percent when voluntarily withdrawn prior to death. Moody did not contest the finding of insolvency and made no appeal from the trial court's ruling of June 29, 1972. Apparently Moody accepted the insolvency finding because when the receiver obtained approval from the lower court to solicit reinsurance proposals, Moody was one of those who submitted plans for the rehabilitation of the company. Moreover, Moody made no issue of Empire's insolvency during the lengthy hearing in April, 1974 when the issue of rehabilitation or reinsurance was aired. Accordingly, Moody's attempts to raise that issue on this appeal must also fail. *Dennis v. Hines*, 262 Ala. 541, 80 So.2d 616 (1955).

The record reveals more than ample evidence upon which the trial court could have determined that further efforts at rehabilitation would be useless, and that reinsurance was necessary to prevent loss of all policyholder benefits to them. The Protective Life Insurance Company was one of those tendering a reinsurance agreement, and there is evidence in the record of a comparative analysis establishing it as the better of those proposed.



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Protective's plan guaranteed payment of all death benefits, as well as all other maturity benefits, on all Empire policies. It also provided for full payment of all cash benefits accruing after September 15, 1972. This would guarantee to all policyholders who continued to pay premiums their full policy benefits which would be attributable to their current premiums, *i.e.*, cash surrender value, loan value, etc. It provided for a limitation on those cash benefits which policyholders could exercise voluntarily, simply because Empire's assets were worth much less than the reserve liabilities which Protective would assume. The effect of the "moratorium," thirty-five percent, later increased by the trial court to fifty percent because of the expense of defending Moody's numerous lawsuits, would be to reduce the reserves Protective would have to establish. However, Protective agreed to a ten-year limit upon the moratorium, thus providing full policy benefits at the end of ten years to policyholders accepting the plan. In executing its plan, Protective agreed to place with the receiver an amount of assets equal to the reserve liability of every policy of those policyholders rejecting the plan, less the moratorium amount. Because such a payment by Protective represented the value of the agreement to accepting policyholders as well, both classes of policyholders, those accepting and those rejecting, were treated equally. Protective further agreed to make an annual calculation of the ratio of Empire's assets to its reserve liabilities and to reduce the amount of the moratorium as that ratio improves. Also, Protective agreed to receive no profit until this moratorium is eliminated and all policyholders' benefits are restored to accepting policyholders. Any profits were to be added to Empire's assets.

Non-policyholder creditors whose claims were not assumed by Protective were provided for by having the receiver retain from the assets of Empire a two million dollar fund for the payment of their claims. This fund was specified in the advertisements for reinsurance bids, and the evidence is uncontroverted that it is sufficient for the equitable payment of such claims.

Under the facts of this case we cannot state that the trial court abused its discretion by ordering liquidation and reinsurance. The commissioner of insurance has followed the applicable statutory procedures of Title 28A, *Alabama Code*, relative to these delinquency proceedings, and the evidence adduced sufficiently established insolvency in the first instance, the necessity for liquidation, and a fair and equitable reinsurance plan thereafter. The findings and conclusions of the trial court are due to be affirmed. *Stephens v. Stephens*, 280 Ala. 312, 193 So.2d 755 (1966); *First Nat. Bank of Birmingham v. Brown*, 287 Ala. 240, 251, So.2d 204 (1971).

## AFFIRMED.

Torbert,<sup>1</sup> C. J., Maddox, Faulkner and Shores, JJ., concur.

<sup>1</sup>Chief Justice Torbert was not a member of the Court at the time this case was orally argued. However, he has carefully listened to the tape recordings of oral argument and studied the briefs. *Code of Alabama*, Tit. 13, § 7; *Alonzo v. State ex rel. Booth*, 283 Ala. 607, 219 So.2d 858.

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APRIL 22, 1977  
THE SUPREME COURT OF ALABAMA  
JUDICIAL DEPARTMENT

SC 931  
SC 1268  
SC 1270

SHEARN MOODY, JR.

VS.

STATE OF ALABAMA,  
EX REL. CHARLES H.  
PAYNE,  
COMMISSIONER OF  
INSURANCE AND  
RECEIVER OF  
EMPIRE LIFE  
INSURANCE  
COMPANY OF  
AMERICA

JEFFERSON CIRCUIT COURT  
NO. 171-687

**ORDER**

IT IS ORDERED that the applications for rehearing filed in these causes on February 25, 1977, be, and the same are hereby, overruled.

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[6941] **OBJECTIONS AND COMMENTS OF  
G. L. MYERS AND W. B. SANFORD RELATING  
TO PROPOSED AGREEMENT**

Comes now G. L. Myers and W. B. Sanford, claimants, in this proceeding, and pursuant to the Order of this Honorable Court dated March 26, 1975, makes the following objections and comments concerning the Petition of Receiver for Order Approving Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance, which Petition was filed on March 26, 1975, and hereby states as follows:

**I.**

Claimants Myers and Sanford reaffirm the objections and comments of Shearn Moody, Jr. relating to the proposed agreement, a copy of which objections is attached hereto and incorporated by reference herein.

WHEREFORE, G. L. Myers and W. B. Sanford respectively requests leave to file additional objections and comments at a later date and they respectfully pray that the aforementioned Petition of the Receiver be denied.

Respectfully submitted,  
WILLIAM H. MILLS

William H. Mills  
1033 Frank Nelson Building  
Birmingham, Alabama 35203

*Attorney for Claimants*



[6942] **CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Objections and Comments have been served upon the Honorable James W. Webb, Attorney of Record for the Receiver by mailing a copy of the same to him in the United States mail, properly addressed and with sufficient postage prepaid.

This the 5th day of April, 1975.

WILLIAM H. MILLS  
*Of Counsel for Claimants*

[6943] **OBJECTIONS AND COMMENTS OF  
SHEARN MOODY, JR. RELATING TO PROPOSED  
AGREEMENT**

Comes now Shearn Moody, Jr., an Intervenor in this proceeding, and pursuant to the Order of this Honorable Court dated March 26, 1975, makes the following objections and comments concerning the Petition of Receiver for Order Approving Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance, which Petition was filed on March 26, 1975, and hereby states as follows:

1.

By letter dated February 28, 1975, Protective Life Insurance Company notified the Honorable Charles H. Payne, Receiver for Empire Life Insurance Company of America, that unless all of the conditions specified in 1, 2 and 3 on page 2 thereof were met within the time limit specified therein, then the Treaty of Assumption and Bulk Reinsurance between the Receiver of Empire Life Insurance Company of America (hereafter called "Empire") and Protective Life Insurance Company (hereafter called "Protective") was terminated effective March 1, 1975. A copy of that letter is annexed hereto and made a part hereof.

Shearn Moody, Jr. (hereafter called "Moody") is informed and believes that none of the conditions have been met and, [6944] therefore, the Treaty of Assumption and Bulk Reinsurance has been terminated. Shearn Moody, Jr. alleges upon information and belief that although the said Receiver did not transfer any assets of Empire to Protective, as referred to in 1 on Page 2 of the said letter dated February 28, 1975, that someone other than the said Receiver sent a telegram to Curtis

E. Brown of the Republic National Bank of Dallas authorizing and directing transfer of securities owned by Empire to Mr. William Phillippi, as agent for Protective, and that said Bank made such transfer without authorization by the said Receiver and that he has not confirmed or ratified the said telegram.

Moody is further informed and believes that neither this Honorable Court nor the Honorable Herman Jones have approved a Fifth Amendment to the said Treaty of Assumption and Bulk Reinsurance.

## 2.

Since the Treaty of Assumption and Bulk Reinsurance has been terminated by Protective by the aforementioned letter dated February 28, 1975, there is no agreement to effectuate and the Petition of the Receiver for an Order Approving "Agreement to Effectuate" such Treaty should be denied.

## 3.

The Proposed "Agreement to Effectuate" the Treaty not only is an attempt to effectuate an agreement which has already been terminated by Protective, but it also is an attempt to substantially modify the terms and conditions of the prior Treaty without a hearing thereon and without any justification therefor.

Thomas K. Pennington, Vice President and Actuary for Protective, testified before the Honorable Herman Jones at the hearing conducted by him upon the Motion of the Ancillary Receiver for approval of the Treaty of Assumption and Bulk Reinsurance. Such hearing was conducted commencing February 10, 1975. At that time, Mr. Pennington testified that he knew [6945] of no material adverse change in the financial condition

of Empire which would necessitate any increase in the moratorium and that the moratorium would not be increased by more than 3% on account of the Old National policies. At the time of such hearing, Protective was fully aware of and had previously considered the question of its lack of insurable interest upon Moody's life. It was also fully aware of Cause No. 112034 in the 122 District Court of Galveston County, Texas and of the telegram of January 14, 1975, from Scott E. Manley to Gene D. Wyatt, President of Moody National Bank, as Trustee for the Libbie Shearn Moody Trust. The proposal under the proposed agreement attached to the said Petition of the Receiver to increase the moratorium on Empire policies to 50% of the withdrawable funds is thus totally unwarranted and contrary to the position of Protective through the sworn testimony of its said Vice President and Actuary. Moreover, approval of such proposed agreement without a hearing thereon would be a complete denial of Intervenor's and other parties' constitutional rights to due process.

## 4.

The State of Alabama has adopted, with some modifications, the Uniform Insurers Liquidation Act, effective January 1, 1972. Title 28 (A) Alabama Insurance Code, Sections 621-641. It is without question that the purpose of the Uniform Insurers Liquidation Act is to achieve equality among claimants. Couch on Insurance, §22:82, P. 777; *Ace Grain Company v. Rhode Island Insurance Company*, 107 F. Supp. 80 (1952), *aff'd.*, 199 F.2d 758 (2 Cir.); 46 A.L.R. 2d 1185. Policyholders are general creditors of the insurance company in receivership, and as such are entitled to share ratably in the distribution of the

assets of the Company. However, they are expressly prohibited from receiving any preferential treatment.

This rule was made clear in the case of *Melco Systems v. Receivers of Transamerica Insurance Company*, 105 So.2d 43 (1958). [6946] In that case, the Supreme Court of Alabama held that the proceeds of a reinsurance agreement constituted general assets to which an insured had no priority over other creditors. All creditors had to share equally in the assets of the company and this included policyholders. See also, *Fletcher v. State Treasurer*, 16 Mich. App. 87, N.W. 2d 194 (1969). It is abundantly clear that the Treaty of Assumption and Bulk Reinsurance between the Receiver and Protective (with or without the Fifth Amendment) provides for unequal treatment to the policyholders and creditors of Empire and provides for preferential or priority treatment in many respects, some of which are as follows:

A. The Reinsurance Agreement provides for assumption of policy liabilities, subject to a 35% or more (now 50%) moratorium on withdrawable funds. Policyholders have the right to approve or disapprove and if they disapprove, then they file their claims as general creditors. If they approve, then they have the benefits of the reinsurance, subject to the aforementioned moratorium. Two million dollars is left with the Receiver out of the Empire assets to satisfy the claims of all general creditors, including the non-consenting policyholders and creditors who are not policyholders, and to pay the expenses of administration. There has been no determination as to the amounts of the claims of such general creditors (including non-consenting policyholders), nor has there been any determination as to what the expenses of administration

may be. A prior request for an accounting by the Receiver has been denied by this Honorable Court. Presumably it is contemplated that the Receivership will continue for 10 years, since the Treaty provides for the Receiver to pay his pro rata part of insurance policies upon the life of Moody prior to the cancellation of the moratorium. Obviously, no one can determine at this date that general creditors (including non-consenting policyholders) will have equal treatment to the treatment afforded consenting policyholders [6947] under the Reinsurance Agreement. They could fare worse or even better. No one knows and no one has even attempted to find out.

B. Under the Treaty, Protective has the right to file claims against the Two Million Dollar Fund aforementioned on behalf of the policyholders who consent to the reinsurance. The amounts paid on such claims are added to the Empire Fund. Quite obviously, this prefers such consenting policyholders over those who do not consent, since they are given the benefits under the Reinsurance Agreement and the benefit of a claim against the Two Million Dollar Fund. The non-consenting policyholders have only a claim against the Two Million Dollar Fund.

C. Under the terms of the Treaty, if an assumed policy becomes paid up after June 9, 1972, the cash value is used to buy the paid up insurance reduced by one-half the moratorium. If this same policy is later turned in for cash, then the cash value of the reduced paid up insurance is reduced again by the then moratorium amount. This charges such policyholders twice.



D. The amount of the moratorium under the Treaty is to be computed annually and gradually reduced. Attached hereto is a letter dated March 28, 1974 from the aforementioned Thomas K. Pennington to Dr. A. C. Olshen, Consultant to the Insurance Commissioner for the State of Texas to which is attached a projection by Protective of the first 10 years of operation after the Treaty becomes effective, and showing the reduction thereof. At the aforementioned hearing before the Honorable Judge Jones, Dr. Olshen testified that this periodic reduction in the moratorium had the effect of making the Reinsurance Treaty "semi-tontine", in that it gave policyholders who did not convert to cash or [6948] lapse their policies more than those who did, and in that the longer a policyholder held on to his policy, the more he would receive. Conversely, the sooner he converted to cash or lapsed, the less he would receive. This obviously provides for unequal treatment to policyholders, contrary to the Alabama law. This projection clearly illustrates that a policyholder who converts to cash during the first year of the effective date of the Treaty receives same subject to a 35% moratorium (now 50%). This amount is gradually reduced each year until the tenth year, at which time such policyholder would receive the full cash value of his policy without any moratorium deduction.

E. Under the Treaty, policyholders with participating policies must give up all their rights to dividends, except the United Founders policyholders, who are to continue to receive their dividends. This prefers them over the other policyholders.

F. Under the terms of the Treaty with Protective, the basis of the moratorium amounts for certain policies is the with-

drawable funds thereof. With respect to other policies, the basis is the total values of separate accounts for such policies. For others, the basis is the total policy reserves less policy loans. Accordingly there are three different bases for moratoriums. The moratorium amounts on certain policies is 35% of the withdrawable funds; on others, it is 35% of the net reserves; and on others, it is 35% of the total value of separate accounts. This obviously provides for preferential treatment of certain policyholders over others.

G. Policyholders with matured endowments or coupons left on deposit with Empire prior to the effective date of the Protective Treaty are charged the full amount of the moratorium, but those whose endowments mature [6949] after the effective date, or whose coupons are left on deposit after the effective date are not so charged. This obviously prefers certain policyholders over others.

H. The Protective Treaty contained different dates for the determination of rights of various parties and thereby prefers certain policyholders and claimants over others.

## 5.

The Protective Treaty states that the moratorium on some of the policies has been based upon the withdrawable funds. However, both Dr. Olshen and Mr. Pennington testified at the aforementioned hearing to the effect that the withdrawable funds on the Empire policies have never been computed. If they had been computed, then Moody is informed and believes that the moratorium would have been only 7%, instead of the 35% (now 50%) provided in the Treaty.



## 6.

The Treaty provides that stocks and bonds of Empire, other than stocks of affiliates, shall be carried at statutory admitted book value by Protective in the Empire Fund. However, stocks of affiliates are to be carried only at their pro rata portion of the capital surplus of such companies, without giving any consideration to the cost of such stocks or the value of the insurance in force of such companies. This will require a substantial deduction in the amount of the Empire assets and thereby be detrimental to the policyholders of Empire.

## 7.

If the moratorium had been computed on the basis of the difference between the statutory admitted assets according to Empire's latest convention statement and its liabilities according to said statement (to-wit: the amount of the deficiency in statutory admitted assets) it would have been approximately 20%, as compared with the original 35% (now 50%) [6950] provided in the Treaty. Moreover, if it had been computed with any consideration for the value of the insurance business of Empire, there would have been no need for any moratorium. George V. Stinnes and Associates, Consulting Actuaries, value the Empire business for the Texas Insurance Commissioner in 1972 at \$6,400,000. Under the terms of the Protective Treaty, Protective receives the entire benefit of the value of such business without any accounting to the policyholders, creditors or stockholders.

## 8.

Under the Protective Treaty various assets of Empire could be held until after the moratorium is cancelled and then sold

at substantial profits, all of which would inure to the benefit of Protective without any accounting to Empire policyholders, creditors or stockholders. Such assets include the stock owned by Empire in Investors Preferred Life Insurance Company and National Insurance Company of America.

## 9.

Under the Protective Treaty, the Empire assets are commingled with Protective assets, which makes it much more difficult for them to be accounted for. They should be separated and treated separately as Protective is now doing for assets of other insurance companies. In addition, under the Treaty, Protective does not have the responsibilities of a Trustee and it should have such responsibilities.

## 10.

It is provided in the Protective Treaty that if approvals cannot be obtained under the respective holding company acts for transfers of shares of Empire affiliates, then they will simply be held in trust for Protective. This is merely an attempt to do indirectly what cannot legally be done directly and appears to be a clear violation of such acts.

## 11.

Under the Treaty, Protective warrants that it is taking shares of subsidiaries of Empire for investment and not for [6951] distribution, but Moody is informed and believes that Protective publicly solicited sales of the shares of National Insurance Company of America and is privately negotiating (without public solicitation) for the sale of shares of Investors Preferred Life Insurance Company to a company represented by the ex-

insurance commissioner of the State of Texas who held office as such commissioner when a Receiver was appointed for Empire. The public solicitation of bids is contrary to Protective's representation in the Treaty. The private negotiations aforementioned are inconsistent with the public solicitation and discourages competitive bidding which should result in a higher price.

12.

Under the terms of the Treaty, any increase in the value of the Libbie Shearn Moody Trust inures to the benefit of Protective, rather than the policyholders, creditors and stockholders of Empire.

13.

Protective does not have an insurable interest on the life of Moody.

14.

A majority of the assets of the Receivership are in the State of Texas and a majority of the premium income of Empire is from policies upon persons who reside in the State of Texas. However, the Ancillary Receiver for the State of Texas is not a party to the Treaty and has no control or authority whatsoever under it.

15.

There is no provision under the Treaty for payment of expenses of administration by any of the ancillary receiverships from the Two Million Dollar Fund aforementioned.

16.

The Protective Treaty is expressly for the benefit of Empire,

Protective and the Receiver and expressly denies any [6952] rights or remedies to any other person, firm or corporation. This will have the effect of preventing policyholders who consent to the reinsurance from being third party beneficiaries to the reinsurance agreement or having any right to sue thereunder for any breach of contract by Protective.

17.

The assumption certificate attached as Exhibit "A" is not consistent with the various amendments to the Treaty, nor even the Treaty itself. For example, it states that the moratorium must terminate in 15 years. Moreover, it states that it affects only the cash surrender and loan values and those values relating to such values. This is not correct for the reason that it affects matured endowments and coupons left on deposit. The assumption certificate states that death endowment and maturity benefits would be paid in full. Certain of the death benefits are not to be paid in full under the Treaty and matured endowments left on deposit are not to be paid in full. The assumption certificate states that Protective has a right to terminate if an appeal is taken from any order approving the Treaty, but that right was waived under an amendment.

18.

It is unfair and a denial of due process to send assumption certificates to policyholders upon terms by which they are deemed bound unless they file a written objection within 60 days, especially since they have had no notice of the proceeding concerning the Treaty and no opportunity to object to the terms thereof.

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19.

The amounts to be paid Protective during the period of moratorium for servicing the policies and handling the investments is excessive and unfair to the Empire policyholders.

20.

Under the terms of the Protective Treaty, the Libbie Shearn Trust is to be valued at only \$4,250,000. This [6953] is the lowest of two values given in a 1968 appraisal by American Appraisal Company which call for periodic re-evaluations, none of which have been made. It is too low and unfair to the Empire policyholders.

21.

Under the terms of the Protective Treaty, Protective may receive the entire Twelve Million Dollars death benefits on policies on the life of Moody. This would amount to an unjust enrichment to Protective in the event of the untimely death of Moody.

22.

Under the terms of the Protective Treaty, the Empire assets are to always exceed by 5% the Empire liabilities. This gives Protective an increase in its surplus by 5% of Empire's assets at no cost. The Protective Treaty is unfair to the Empire policyholders, creditors and stockholders. It does not require Protective to put up or pay anything, except to make a guarantee that the moratorium will be cancelled in 10 years. According to Mr. Pennington's aforementioned letter to Dr. Olshen, it is projected that this will be accomplished by a reduction in the moratorium from the Empire operating earnings. Thus, according to the projections, Protective takes no risks whatsoever.

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23.

In support of Moody's position aforementioned that the Libbie Shearn Moody Trust interest of Empire should be valued at a higher figure than \$4,250,000, there has been previously filed in this Court an evaluation of such interest by Dr. Trosper.

24.

Moody is informed and believes that news releases concerning Empire disseminated prior to the appointment of a Receiver and contrary to the laws of the State of Alabama discouraged bidders from bidding upon the reinsurance of Empire's business by creating a wrongful impression that such [6954] business was worthless. Moody respectfully submits that new bids should be solicited.

25.

This Honorable Court approved the Protective Treaty after hearing testimony from Dr. A. C. Olshen to the effect that Empire had a lapse ratio of approximately 18%. However, according to the auditor for the State Board of Insurance for the State of Texas, Ora M. Davis, that ratio was only approximately 5%. (His letter to that effect is an exhibit in the recent hearing in the 53rd District Court, Travis County, Texas)

26.

At the aforementioned hearing before Judge Jones, the aforementioned Mr. Pennington testified that Protective expects to get between five and seven-and-a-half million dollars profit from its Treaty with the Receiver. This will be at the expense of Empire's policyholders, creditors and stockholders and rightfully belongs to them.



27.

According to the projection made by Mr. Pennington and attached to his letter dated March 28, 1974 to Dr. Olshen (a copy of which is attached) the 35% moratorium will have ended by its own cancellation in 10 years. Empire's policyholders, creditors and stockholders would be better off without any reinsurance and with the continuation of the current court imposed moratorium and operation of the company by the Receiver, for the reason that by Mr. Pennington's own figures and projection the moratorium would be ended from Empire's earnings in a period of not more than 10 years (at a 35% moratorium) and the company could then be returned to its policyholders, creditors and stockholders, intact and solvent with all residual values thereafter inuring to their benefit rather than to Protective's benefit.

28.

[6955] Empire is solvent and there is no need for any reinsurance.

WHEREFORE, Shearn Moody, Jr. respectfully requests leave to file additional objections and comments at a later date and he respectfully prays that the aforementioned petition of the Receiver be denied.

Respectfully submitted,

A. R. Schwartz

Box 129B Capitol Station

Austin, Texas

Attorney for Shearn Moody, Jr.

[4852] **PROTECTIVE'S EXHIBIT Number 6**

**"PROPOSED TREATY OF  
ASSUMPTION AND BULK REINSURANCE  
EMPIRE LIFE INSURANCE COMPANY  
OF AMERICA"**

**PROTECTIVE LIFE  
INSURANCE COMPANY  
HOME OFFICE — BIRMINGHAM, ALABAMA**



[4853] Executed in 3 Counterparts of  
which this is Counterpart No. 2.

### TREATY OF ASSUMPTION AND BULK REINSURANCE

This Agreement is made and entered into in Birmingham, Alabama, as of this 31st day of May, 1974, effective as stated hereinbelow, by and between JOHN G. BOOKOUT, Commissioner of Insurance, State of Alabama (herein the "Receiver") in his capacity as Receiver of Empire Life Insurance Company of America, an Alabama corporation, in receivership (herein "Empire"), and PROTECTIVE LIFE INSURANCE COMPANY, Birmingham, Alabama, an Alabama corporation (herein "Protective").

I. *Identity of Protective.* Protective was incorporated under the laws of the State of Alabama on July 24, 1907, is qualified to do business as a capital stock legal reserve life and health insurance company and had capital and surplus of \$25,969,339.96 as shown in its 1972 Annual Statement, of which \$19,369,339.96 was indicated as surplus, and as of September 30, 1973 had approximately \$26,013,065 of capital and surplus. The executive offices of Protective are located in Birmingham Alabama.

II. *Identity of Empire; Consideration.* Empire was incorporated under the laws of the State of Alabama on June 27, 1963. At its inception and at various dates thereafter Empire both assumed business from, and ceded business to, various other insurance companies as well as directly issuing life, health and accident and annuity policies. By order of the Circuit Court for the Tenth Judicial Circuit of Alabama (herein "Court") in Equity Case No. 171-687, entered June 29, 1972, Empire was

found to be impaired and the Honorable John G. Bookout, Commissioner of Insurance, State of [4854] Alabama, was named Receiver. The Receiver having determined that the full rehabilitation of Empire did not appear feasible, the Receiver has advertised under order of the Court dated September 12, 1973, for proposals for assumption of the outstanding insurance policies of Empire, and this Agreement is submitted in response to such advertisement and shall constitute a firm and binding contract with Protective when and if accepted by the Receiver and approved by order of said Court, provided, however, that if not so accepted and approved by January 31, 1974 (unless such time be hereinafter extended in writing by Protective), this Agreement shall be null and void and of no further effect.

III. *Effective Date.* The Effective Date of this Agreement shall be 12:01 A.M., C.S.T., on the ..... day of ....., 197 ..., which shall not be a date prior to January 1, 1974.

IV. *Definitions.* As hereinafter used, the following terms shall have the meanings set out below and none other:

A. "Empire Policies" shall mean (1) all life insurance, accident and health and annuity contracts or policies which have been either (i) issued by Empire prior to the Effective Date of this Agreement or (ii) assumed by Empire prior to June 29, 1972, and (iii) which had not been ceded by Empire to, and assumed by or purportedly assumed by, some other company prior to June 29, 1972, (2) all supplemental contracts issued by Empire as [4855] a consequence of the policies defined in (1) above, and (3) all supplemental benefits or riders issued in connection with the policies defined in (1) and (2) above. It is expressly understood that the term "Empire Policies" shall not refer to any policy issued on Protective forms as a result of

conversion privileges or purchase options contained in Empire Policies.

B. "Old National Policies" shall mean only that specific block of paid-up insurance which had been written or assumed by Empire and which on or about June 19, 1967, Empire ceded to Old National Insurance Company, Montgomery, Alabama, an Alabama corporation (herein "Old National") and Old National assumed in a reinsurance agreement. Inasmuch as Old National has been found to be insolvent and the receiver of Old National is seeking to set aside and declare void the assumption of the Old National Policies from Empire and is asserting that such policies are the liability of Empire, the "Old National Policies" are a subject of this Agreement as set forth hereinbelow.

C. "Withdrawable Funds" shall mean any funds that may be withdrawn under the terms of a policy by voluntary action of the insured or other owner of such policy and shall normally be equal to the policy cash value plus the cash value of any paid-up additions, any dividend accumulations, any pure endowment accumulations or coupon accumulations, any prepaid premiums on the policy and any contingent pure endowment payments, less all outstanding policy loans.

[4856] D. "United Founders Treaty" shall mean that certain Reinsurance Treaty entered into by Empire and Republic Investors Life Insurance Company, East Moline, Illinois, now called United Founders Life Insurance Company of Illinois (herein "United Founders") on or about April 3, 1968.

E. "Assumed Policies" shall mean Empire Policies, Old National Policies, the United Founder Treaty and any policies

assumed by Protective after the Effective Date hereof as a result of or arising out of the administration of the Empire Assets (as defined in Section IX.A.).

V. *Cession and Transfer by Receiver.* The Receiver on behalf of Empire agrees to transfer, assign, cede, deliver and convey, and does hereby transfer, assign, cede, deliver and convey, to Protective, by way of total reinsurance, subject to the terms, conditions and provisions hereof, (1) all of the rights, privileges and prerogatives of Empire in and to those certain policies and contracts of insurance identified herein as Old National Policies and Empire Policies, (2) all rights, claims and interests which Empire has against, or in the receivership estate of, Old National, whether on account of attempted or actual rescission of the 1967 reinsurance agreement referred to in Section IV.B. or otherwise, and (3) all of the rights, privileges, prerogatives, contracts, agreements and treaties of reinsurance and/or co-insurance (without assumption) with other insurance companies covering risks of Empire reinsured and/or co-insured with other insurers and covering risks of other [4857] insurers ceded to and reinsured and/or co-insured (without assumption) by Empire in effect on the Effective Date hereof, including, but without limitation, all rights and interests of Empire under the United Founders Treaty.

Receiver further agrees to transfer to Protective, subject to the terms, conditions and provisions hereof, all assets of Empire except as specified hereinbelow in Section VII, and agrees to execute any and all documents and take all other action deemed advisable by Protective to effectuate or facilitate the transfer of assets or other assignments and transfers contemplated by this Section V.



Protective agrees to accept the assets so transferred and assigned subject only (without assumption) to the mortgages and other liens and encumbrances thereon but only to the extent that the same are disclosed in Empire's 1972 Annual Statement.

VI. *Assumption by Protective.* Protective does hereby reinsure and assume as of the Effective Date (subject to the terms, conditions and provisions, and only to the extent as, hereinafter specifically provided) the liability of Empire under the Empire Policies and, if any, under the Old National Policies (except as provided hereinbelow), subject, however, to any and all defenses or offsets against the claims and actions on said policies which would have been available to Empire or Old National (as applicable) had this Agreement [4858] not been made, and further does hereby assume as of the Effective Date (subject to the terms, conditions and provisions, and only to the extent as, hereinafter specifically provided) all of the rights, privileges, prerogatives, contracts, agreements, treaties or reinsurance and/or co-insurance with other insurers (without assumption) referred to in Section V and the obligations thereunder. The terms and conditions of such assumption are as set forth below in this Section VI and in the remaining provisions of this Agreement:

A. *Old National Policies.* Protective shall endeavor to enter into an agreement with the receiver of Old National to assume the Old National Policies subject to the terms and conditions hereinbelow in Sections VIII, VII and XIV and agree that, if such an agreement cannot be reached, a court of arbitration shall be appointed consisting of three arbitrators, one selected by the Commissioner of Insurance, State of Alabama, one by the Commissioner of Insurance, State of Texas, and one by Protective, and such court of arbitration shall, after a hearing, draft

a reinsurance agreement as to the Old National Policies not inconsistent with any provision contained in this Agreement which shall be binding on said receiver and Protective but limited to policyholder liabilities arising from the Old National Policies. The terms and provisions of Section XVII, except as to the composition of court, shall apply. After the proper execution of such reinsurance agreement [4859] on behalf of Old National with all necessary Court or regulatory agency approvals thereof, and after the effective date of such agreement, for the purposes of this Agreement, Old National Policies shall be thereafter considered to be Empire Policies as defined.

After the Effective Date hereof and prior to the effective date of such an agreement, if any, Protective shall pay valid claims under the terms of said Old National Policies on account of deaths occurring on and after the Effective Date (and prior thereto as specified in Section VI.E. below) to the extent that such claims have not been previously paid by either Empire or Old National; provided, however, that (1) Protective shall have all defenses or offsets against claims and actions upon said policies which would have been available to Old National or Empire had this Agreement not been made, (2) no such payment or payments shall be deemed evidence of, or any admission that, the Old National Policies are Protective's obligations to any greater extent than they were liabilities of Empire prior to this Agreement or that Protective is hereby or otherwise assuming any greater obligations on account of Old National Policies than Empire had prior to the Effective Date hereof or otherwise, and (3) that payment of such claims by Protective shall be taken into account and allowed for in any reinsurance agreement with Old National's receiver.

Protective further agree that, as described [4860] further in Section VIII.C. below, any amounts received by Protective from Old National's receiver on account of rescission of the 1967 Empire-Old National reinsurance agreement shall be applied to reduce the Moratorium Amounts otherwise applicable to Old National Policies and shall be included in the Empire Assets for the purposes of accounting under this Agreement, all as provided for hereinafter.

B. *United Founders Treaty*. Protective agrees to assume Empire's obligation to United Founders under the United Founders Treaty subject to the moratorium provisions set forth below in Section VIII relating to such treaty. Protective further agrees to assume Empire's obligations under Paragraph 10 of the United Founders Treaty to administer directly under certain conditions the United Founders policies related thereto. Protective agrees that in the event it shall be required under said Paragraph 10 to so administer policies or if it shall elect under Paragraph 12 of said treaty to assume directly the United Founders policies related thereto, there shall be no change in the status of the policyholder thereof nor shall any moratorium be placed in effect against them. In the event of such assumption, the policies so assumed by Protective shall be considered to be "Empire Policies" for all purposes of this Agreement except that they shall not be subject to the provisions of Sections VIII and XII relating to Moratorium Amounts and revision of dividend provisions.

[4861] C. *Third Party Indemnity Reinsurance Agreements*. Protective accepts and assumes as of the Effective Date all right, title and responsibilities of Empire under "third party indemnity reinsurance agreements" by which is meant those reinsurance

and/or co-insurance agreements with other insurance companies covering risks of Empire reinsured and/or co-insured with other insurers, without assumption, and covering risks of other insurers ceded to and reinsured and/or co-insured by Empire, without assumption. It is not the intention of the parties to affect, nor shall any provisions of this Agreement be construed as affecting, in any way, such reinsurance of a portion of the risk under some of the Empire Policies with any third party reinsurer under existing indemnity reinsurance agreements between Empire and such companies, although Protective expressly reserves the right, and anticipates that it shall exercise the right, under the recapture clause contained in said agreements to adjust the retention on the Empire Policies to Protective's retention levels.

D. *Reinstatement*. Protective agrees to assume Empire's obligation to reinstate any policy which is or should have been in the classes assumed under this Agreement which on the Effective Date hereof by its terms was entitled to reinstatement, provided that all requirements necessary to procure reinstatement of such a policy under its terms are fulfilled to the satisfaction of Protective. Upon such reinstatement of any such lapsed [4862] policy, it shall for all purposes be treated as if it had been in force from the date on which it lapsed except that it shall be subject to all of the terms and conditions of this Agreement as may pertain to the class of policy in which it was or should have been.

E. *Pending and Unreported Claims*. Protective agrees to assume Empire's liability in connection with all outstanding claims on Empire Policies or Old National Policies, whether in process of settlement or incurred but not yet reported as of the



Effective Date, provided, however; that Protective does not assume liability on any claim which has heretofore been rejected by Empire or Old National, as applicable, whether or not such claim is being contested in the courts, it being understood that any contingent liability on account of any such rejected claim shall remain the liability of Empire or Old National, as applicable.

F. *Commissions.* Protective agrees to assume Empire's liability with respect to any commission due for premiums collected by Empire before June 29, 1972, but only to the extent that such commission was included in the liabilities reported in the Annual Statement of Empire as of December 31, 1972 and reflected on Empire's books and records. It is expressly understood that Protective is not assuming any obligation for commissions not reflected on such Annual Statement or due on account of premiums collected after June 29, 1972 or to be collected in the future.

[4863] G. *Liabilities Not Assumed.* Protective does not assume any liability to policyholders, stockholders or creditors of Empire or Old National not specifically set forth above. In amplification but without limitation of the generality of the forgoing statement, Protective does not assume any liability and shall have no liability for:

1. Any obligation of Empire on account of agreements entered into with other companies under which Empire ceded, and such companies assumed or purportedly assumed, policies issued or assumed previously by Empire (except as set forth in Section VI.A. above).

2. Any claim by creditors of Empire on account of any obli-

gation not arising out of any policy or contract specifically assumed above.

3. Any claim by any person, firm or corporation on account of any guaranty or endorsement or other agreement by Empire with respect to funds borrowed by or advanced to employees, subsidiaries, affiliates or any person, firm or corporation, related or unrelated, whether or not Empire had guaranteed or endorsed such advances or loans prior to the Effective Date hereof.

4. Any dividend claimed by any policyholder of American Trust Life Insurance Company or by any other person, firm or corporation, which dividend was not (a) previously declared by Empire and (b) either (i) paid to the policyholder or (ii) included in the provision for dividend accumulations or for paid-up additions, as shown [4864] in Empire's Annual Statement of December 31, 1972. Any such claim alleged on account of any policy, whether or not such policy is assumed by Protective under this Agreement, shall be the sole liability of Empire.

5. Any surplus debenture or other evidence of indebtedness whatsoever issued by Empire or by any company and assumed by Empire prior to the Effective Date hereof.

6. Any obligation for commission which may have been due on account of premiums collected or to be collected after June 29, 1972.

7. Any and all obligations for unpaid premium taxes.

8. Any deficiency with respect to any mortgage on real estate transferred to Protective.

## VII. *Assets to be Transferred.*

A. The Receiver on behalf of Empire agrees to transfer, assign, deliver and convey to Protective, and take all necessary action and execute all appropriate documents to convey to Protective good and merchantable legal title to, all assets of Empire, except that Receiver may retain the sum of Two Million Dollars (\$2,000,000) in cash or liquid assets to be used to pay the expenses of the receivership and to satisfy creditors for liabilities not assumed by Protective hereunder. In the event that the Receiver shall have settled with all such creditors and there shall be left to the account of Empire under the administration of the Receiver any funds, then if Moratorium [4865] Amounts (as defined) are still outstanding against any policies which are the subject of this Agreement or if the Moratorium Amounts shall have been cancelled on account of the expiration of the fifteen year period referred to in Section VIII.D.3. below, then such funds in the account of Empire shall be transferred to Protective to be added to the Empire Fund (as defined below) for use in further reducing the outstanding Moratorium Amounts or to reimburse Protective for any prior reduction of Moratorium Amounts pursuant to the terms hereinafter set forth.

B. If, as of the Effective Date hereof, Protective shall not have received authorization under the respective Insurance Holding Company System Regulatory Acts of Nebraska or Arkansas, or both, to assume control of Lincoln Life and Casualty Company or of Investors Preferred Life Insurance Company, respectively, then the Receiver shall, as escrow agent for the benefit of Protective, continue to hold all Empire's shares of common stock of National Insurance Company of America or Investors Preferred Life Insurance Company, as the case may be, in trust

for Protective until such authorization has been obtained, and when so obtained the Receiver shall transfer the shares evidencing said common stock to Protective as promptly as practicable. With respect to all securities to be transferred by Receiver to Protective, Protective hereby represents to Receiver that it is taking said securities for [4866] investment and not with a view to distribution.

C. The assets of Empire to be transferred to Protective shall be valued for statutory purposes and in determination of the amount of the Empire Fund (as defined) as follows:

1. *Bonds, Real Estate, Mortgages, Collateral Loans and Preferred Stocks.* Empire's bonds, real estate, mortgages, collateral loans and preferred stock shall be transferred to Protective at a value equal to their admitted asset value to Empire on the Effective Date hereof. Said value, adjusted thereafter as required by proper statutory accounting, shall be used in determining the admitted asset value to Protective of such assets and in determining the value of the Empire Fund.

2. *Common Stocks.* All commonstocks owned by Empire shall be transferred to Protective at their market value as of the Effective Date hereof and shall be valued thereafter in determining the value of the Empire Fund at the market value at the valuation date in question, except that stock of "affiliates", as defined in the Alabama Insurance Holding Company Systems Regulatory Act, shall be valued in accordance with Section 3 thereof, and provided further, if there is no readily ascertainable market value for a common stock, Protective shall make a reasonable attempt to obtain a reasonable value for such security, which value shall be its value for Empire Fund purposes. However, if a value for a common stock cannot [4867] be reasonably



obtained, such stock shall be treated as having no value for Empire Fund purposes but shall remain an asset of the Empire Fund.

3. *Furniture, Equipment and Supplies.* In lieu of any separate accounting for all furniture, equipment and supplies of Empire, Protective shall credit the Empire Fund with One Thousand Dollars (\$1,000) and shall have no obligation thereafter to account for such assets in the Empire Fund or otherwise for the purposes of this Agreement.

4. *Agents' Debit Balances.* No value shall be placed on the agents' debit balances of Empire; however, any amounts recovered on account of such balances shall be credited to the Empire Fund.

5. *Libbie Shearn Moody Trust Interests.* For the purposes of Protective's Annual Statement and the determination of the amount of the Empire Fund, the interest in said Libbie Shearn Moody Trust shall be valued at that certain value established by the N.A.I.C., that is, Four Million Two Hundred Fifty Thousand Dollars (\$4,250,000). Protective shall be entitled to increase or decrease such stated value if it appears warranted, provided, however, that such adjustment must be acceptable or required for statutory accounting purposes in Protective's Annual Statement. Receiver represents and warrants to Protective that (i) the Libbie Shearn Moody Trust is a valid and enforceable trust with a duration at least as long [4868] as the life of Shearn Moody, (ii) Empire has a valid, enforceable and assignable right to 40% of the life interest of Shearn Moody in one-eighth (1/8) of the income of said Trust, and (iii) those certain insurance policies issued on the life of Shearn Moody by Empire State Life Insurance Company of Houston, Texas, designated as

Policy Nos. YT-206948-A, YT-208415 and 69YT-208623, assumed on December 31, 1972 by National Western Life Insurance Company, Denver, Colorado, each containing provisions providing for renewal of such coverage until the policy anniversary nearest the insured's sixty-fifth birthday and providing total death benefits in the event of Shearn Moody's death in the amount of Twelve Million Dollars (\$12,000,000.00) shall be in force on the Effective Date hereof on a premium paying basis with premiums due thereon paid to the next policy anniversary of each such policy, and the Receiver further agrees that ownership of these policies shall be transferred to Protective and that Protective shall be named the sole beneficiary under all such policies.

6. *Other Assets.* All other assets shall have the normal values assigned to them pursuant to statutory accounting principles and practices.

It is expressly recognized by the parties to this Agreement that the foregoing valuation methods and the values expressed therein or derived thereby are for purposes of statutory accounting and determination of the amount of the Empire [4869] Fund and shall not be construed as constituting stipulated values for federal income tax purposes. For federal income tax purposes, the value of the foregoing assets shall be determined in accordance with the normal accounting principles and practices for such transactions. It shall be assumed that the value utilized for such assets in federal income tax returns of Protective shall be the value to Empire for tax accounting purposes of these assets.

VIII. *Moratorium.* Inasmuch as the assets of Empire are insufficient to meet its liabilities including reserves, it is necessary to, and Protective shall, place a moratorium against the



Withdrawable Funds under the policies assumed by Protective hereunder in accordance with the following agreements:

*A. Basis of Moratorium Amounts.*

1. With respect to policies described in Section IV.A. and IV.B. and not described hereinbelow in this paragraph A, the initial Moratorium Amount shall be determined based on the Withdrawable Funds of the policy as of the Effective Date hereof and a policy without Withdrawable Funds shall not be subject to any moratorium. However, for the purposes of determining the initial Moratorium Amount of any policy, any policy loan requested of Empire subsequent to June 29, 1972 shall be disregarded.

2. With respect to the separate accounts maintained on account of policies issued by Empire [4870] Life Insurance Company of America, Little Rock, Arkansas, on Form PSIP-1, the Arkansas separate account, and by National Union Life Insurance Company on Form SPP50, the Alabama separate account, the initial Moratorium Amount as of the Effective Date hereof shall be figured against the total values of those separate accounts and if any amount is allocable to a policyholder under the terms of any such contract, the pro rata portion of the then current Moratorium Amount relating to the total separate account involved shall also be allocated to such policyholder. If the amount of the accumulation of any such policyholder in the separate account is to be paid out in cash, such payment shall be reduced by such Moratorium Amount and the acceptance of such amount by the policyholder or other recipient shall constitute full release of Protective with respect to the Moratorium Amount retained. If the amount of such payment is to be added to the dividend accumulating otherwise credited to such policy,

which shall constitute the standard procedure in such case unless the policyholder specifically requests otherwise in writing, then the Moratorium Amount shall be added to and increase the Moratorium Amount otherwise outstanding on such policy.

3. With respect to the United Founders Treaty, the initial Moratorium Amount shall be calculated based upon the total policy reserves on policies covered by such treaty, less the total policy loans and net deferred and uncollected [4871] premiums as of the Effective Date (hereinafter said adjusted total policy reserves being referred to as "Net Reserves").

*B. Effect of the Moratorium.*

1. With respect to those policies described in Section IV.A and IV.B., the moratorium shall not affect any contractual policy benefit except as provided under Section XII with respect to dividends and except as provided below with respect to cash surrenders, policy loans, partial withdrawals, policy conversions or similar policy options and privileges, and determination of nonforfeiture benefits, and the moratorium shall reduce these benefits as follows:

(a) If such a policy is surrendered, the applicable Moratorium Amount shall be deducted from the cash value otherwise payable under the terms of the policy. Acceptance of such reduced cash value by the policyholder shall be a total release of all claims against Protective on account of or in any way arising out of the policy. If any policy shall contain a provision under which the policyholder may continue such policy as paid-up insurance, in whole or in part, without supplying evidence of insurability, or may take a cash payment in lieu thereof, regardless of the description in the policy of such

payment, it shall be construed as a cash surrender for purposes of the moratorium.

[4872] (b) The Moratorium Amount, while not requiring interest, shall otherwise be treated as an addition to any outstanding policy loans for the purposes of applying any policy provisions relating to or referring to policy loans, conversions, exchanges, and similar options and privileges, except that it shall not reduce any death benefit or any benefits payable on maturity of the policy as an endowment other than as specified in subsection (a) above.

(c) If a policyholder has any option, right or privilege to withdraw any amounts from the policy prior to maturity, such option, right or privilege shall only permit withdrawal of funds otherwise available in excess of the Moratorium Amount.

(d) If the policy shall be placed on reduced paid-up or extended term insurance, the amount of the reduced paid-up or the amount and period of such extended term insurance, as the case may be, shall be computed based upon a value equal to the value specified to be used in the policy reduced by one-half of the then applicable Moratorium Amount. The death benefit thus reduced shall not be increased thereafter on account of any subsequent reduction in the Moratorium Amount. The current Moratorium Amount shall be continued against such paid-up insurance, subject [4873] to reduction as provided in Section VIII.D. below, and shall be deducted from the cash surrender value of such paid-up insurance if it shall be surrendered before Moratorium Amounts are cancelled and likewise shall be deducted for the purposes of determining available policy loan values. Notwithstanding the

foregoing, the reinstatement provisions of the policies shall still be effective.

(e) Any policy which became reduced paid-up or extended term insurance after June 29, 1972 and prior to the Effective Date shall have benefits based upon the foregoing provisions except that the Moratorium Amount shall be computed on Withdrawable Funds as of the date such reduced paid-up or extended term insurance became effective.

2. With respect to the United Founders Treaty, no death benefits shall be affected; however, any cash surrender value payable to United Founders under the terms of the Treaty on account of the surrender of a policy covered by such Treaty shall be reduced by an amount equal to the product of such cash value times a fraction the numerator of which is the then current Moratorium Amount on the Treaty and the denominator of which is the then current Net Reserve under the Treaty, both values being computed as of the date of surrender of such policy. The Moratorium Amount of the Treaty shall be reduced by the amount of such cash surrender value reduction. Such cash [4874] surrender value reduction shall be permanent and United Founders shall have no further claim against Protective on account of such policy surrender, whether or not the Moratorium Amount is subsequently reduced as hereinafter provided for. With respect to policy loans under the United Founders Treaty, inasmuch as the Treaty makes no specific provision for participation by Empire in policy loans prior to the assumption date of any such insurance by Empire but Empire has been participating in such policy loans, any policy loans after the Effective Date hereof shall be solely for the account of United Founders and United Founders shall bear all increase in aggregate out-



standing policy loans thereafter from its own assets until such time as the ratio of the aggregate outstanding policy loans borne by United Founders on policies under the Treaty (whether incurred before or after the Effective Date hereof) to the aggregate outstanding policy loans on such policies equals the ratio of the then current Moratorium Amount on the Treaty to the total Net Reserves under the Treaty. Thereafter, Protective shall share proportionally in future policy loans. In the event Protective directly assumes the policies covered by the Treaty, United Founders shall not be reimbursed by Protective in any way on account of existing policy loans at the time of assumption.

*C. Moratorium Amounts.*

1. With respect to those policies described in Section IV.A., the initial Moratorium [4875] Amount shall be thirty-five percent (35%) of the Withdrawable Funds as of the Effective Date.

2. With respect to the separate accounts, the initial Moratorium Amount shall be thirty-five percent (35%) of the total value of those accounts at the Effective Date.

3. With respect to the United Founders Treaty, the initial Moratorium Amount shall be thirty-five percent (35%) of the Net Reserves under the Treaty as of the Effective Date.

4. With respect to the Old National Policies, the initial Moratorium Amount shall be one hundred percent (100%) of the Withdrawable Funds and shall so remain even if Moratorium Amounts on other policies are lowered, until the reinsurance agreement between Protective and the receiver of Old National referred to in Section VI.A. is effective. As of the effective date of such reinsurance agreement, the Moratorium Amount on each Old National Policy shall be adjusted to be equal to the product

of the Withdrawable Funds multiplied by a fraction the numerator of which is the sum of (1) the reserves for all in-force Old National Policies; plus (2) all claims incurred on such policies after June 19, 1967 which were paid by Protective or Empire or which Protective is hereby obligated to pay after the effective date of such reinsurance agreement, less (3) the value of any assets transferred by the receiver of Old National to Protective pursuant to such reinsurance agreement, and the denominator of which is the [4876] reserves for all in-force Old National Policies. Such Moratorium Amount for any of the Old National Policies shall not exceed one hundred percent (100%) of the Withdrawable Funds of the policy as of the effective date of such reinsurance agreement.

*D. Reduction and Cancellation of Moratorium.*

1. If the Empire Fund, as described in Section IX, shall exceed one hundred five percent (105%) of the Empire Liabilities as defined in Section X less the then outstanding aggregate Moratorium Amounts as of December 31 of any year, then as of April 1 of the following year, all the then outstanding Moratorium Amounts shall be proportionally reduced to such an amount that, as of such December 31, the Empire Fund would have equaled one hundred and two percent (102%) of the Empire Liabilities less the outstanding reduced Moratorium Amounts.

2. If after any such adjustment as described in D(1) next above, the then outstanding Moratorium Amounts shall be less than one hundred twenty percent (120%) of one year's annual premium on all premium paying Empire Policies in force on such December 31, all outstanding Moratorium Amounts shall be cancelled on April 1, and Protective shall thereafter pay all



policy benefits in full except as hereinafter provided in Section XII with respect to dividends and except with regard to policies with reduced paid-up or [4877] extended term benefits elected after June 29, 1972 and prior to such cancellation.

3. If there are any Moratorium Amounts outstanding at the expiration of a period of fifteen (15) years after the Effective Date of this Agreement, all such Moratorium Amounts shall be cancelled.

4. Protective shall have the right at any time and from time to time to voluntarily reduce or eliminate any or all Moratorium Amounts, in its sole discretion, whether or not required by any provision hereof.

5. When all Moratorium Amounts are cancelled, Protective shall be relieved from any responsibility or accountability for separate fund accounting for any policy previously affected by the Moratorium Amounts hereunder.

*E. Statutory Treatment of Moratorium Amount.* The Moratorium Amounts shall be treated as a credit against the reserve on the applicable policies in the Annual Statements of Protective.

*IX. Empire Fund.* The "Empire Fund" shall consist of:

A. The "Empire Assets" which shall include:

1. All assets, other than cash or equivalents and other than the furniture, equipment and supplies described in Section VII.C.3 transferred to Protective under Section VII hereof prior to the disposal thereof by Protective;

[4878] 2. Property acquired by Protective from the disposal of property otherwise defined as an "Empire Asset" or trans-

ferred to Protective by the receiver of Old National under the provisions of Section VI.A.; and

3. Policy loans and net due and deferred premiums on Assumed Policies, plus

B. A share in Protective's fixed income investments, sometimes referred to as "commingled assets", the amount and yield of which shall be determined as follows:

1. Cash and equivalents transferred to Protective but not included in the assets under Section IX.A.1. above, plus the \$1,000 stipulated payment under Section VII.C.3. shall be treated as invested as a part of all fixed income investments made by Protective in the first calendar quarter after the Effective Date hereof, and such assets shall be assumed to have the same yield as the average of all such investments made in said quarter.

2. Thereafter, an amount shall be treated as invested during the year in which the same becomes available, which amount is equal to the sum of (i) the profits to Protective on disposal of any Empire Asset, plus (ii) the increase [4879] in Empire Liabilities, plus (iii) the Empire Operating Earnings (as hereinafter defined) or less the losses thereof, plus (iv), in the year received, any cash transferred to Protective by the receiver of Old National under the provisions of Section VI.A. or from the Receiver of Empire under Section VII.A. on account of settlement of all outstanding creditor claims or under Section XIV, less (v) losses on disposal of Empire Assets, and less (vi) decreases in Empire Liabilities, said sum to be increased or decreased, as applicable, by the change in total value of Empire Assets other than that change caused by revaluation

of any Empire Assets. This amount shall be invested and commingled with Protective's fixed income investments for said year and shall be credited thereafter with the yield equal to the average long term fixed yield rate obtained by Protective on its fixed income investment made in the year such amount is treated as invested (as information, this rate was 9.21% in 1971, 9.23% in 1972 and is anticipated to be between 8% and 9% in 1973). If the amount calculated as specified hereinabove in this subparagraph (2) is negative, the Empire Fund shall be debited as if a portion of the commingled [4880] assets referred to above had been sold and the adjustment to yield on commingled assets due to such assets deemed to have been sold shall be determined on the basis set forth above.

C. The requirements for maintenance of the Empire Fund while any Moratorium Amounts are outstanding shall in no way limit Protective's right, in its sole and absolute discretion, to dispose of any of the Empire Assets as it may deem desirable or advisable.

X. *Empire Liabilities*. "Empire Liabilities" shall equal:

A. All reserves and other liabilities of Protective arising from the Assumed Policies; plus

B. Any debt, loss reserves or other liabilities of Protective either existing at the Effective Date hereof or arising thereafter on account of the Empire Assets.

XI. *Empire Operating Earnings*. "Empire Operating Earnings" for any year will be determined as equal to:

A. (1) premiums and other considerations received by Protective on Assumed Policies less any third party indemnity

reinsurance premiums paid by Protective on Assumed Policies; plus

(2) investment income on the Empire Fund which shall be all investment income received on account of Empire Assets plus the assumed yield on the commingled assets described [4881] in Section IX.B., less investment expenses defined below in Section XI.D.; plus

(3) any miscellaneous income received by Protective in connection with the Assumed Policies, less the sum of:

B. (1) all benefits and dividends paid on the Assumed Policies; plus

(2) the increase in Empire Liabilities for the year; plus

(3) premium taxes incurred on the Assumed Policies; plus

(5) an expense allowance for Protective equal to ten dollars (\$10.00) per premium paying Assumed Policy and five dollars (\$5.00) per paid-up Assumed Policy in force at the beginning of the year; plus

(6) any extraordinary expenses arising out of the Assumed Policies which would not normally be incurred in the course of the transaction of life insurance business by Protective, including those expenses involved in maintaining and operating an office in Dallas, Texas and the current data processing system used by Empire until administration of the Assumed Policies can be efficiently transferred to Protective's Birmingham Main Office, plus the identifiable costs of such transfer.

C. Empire Operating Earnings shall be increased or decreased, as appropriate, by the [4882] marginal change in Protective federal income tax liability arising as a result of



the consummation of this Agreement or from Empire Assets, Empire Liabilities and Empire Operating Earnings in the current year.

D. "Investment Expenses" as used hereinabove shall be equal to the sum of:

(1) all out-of-pocket expenses specifically incurred in connection with the Empire Assets, including, but not limited to, all expenses incurred in connection with the administration of real estate transferred to Protective by Empire, and

(2) premiums paid on insurance policies covering the life of Shearn Moody and protecting Protective's life interest in the Libbie Shearn Moody Trust as described in Section VII.C.5. hereof, and

(3) 5.5% of all investment income credited in Section XI.A.2. above, as an administrative charge for supervision of such investments.

E. Protective shall have the right to use reasonable approximations in making the calculations called for by the foregoing provisions. To the extent not otherwise specifically provided for in the foregoing, such amounts shall be calculated in accordance with statutory insurance accounting principles and practices as used in Protective's Annual Statement.

## XII. Dividend Provisions Superseded.

A. *Revision of Dividend Provisions.* Certain policies assumed by Empire from American [4883] Trust Life Insurance Company specifically included provisions by rider or in the basic policy which specified dividend levels as a percent of earnings on American Trust Life business. Empire assumed such obligations upon assumption of such policies but Protective is not

willing to assume such obligations. Other policies either issued or assumed by Empire, by policy provision, written or implied sales materials or oral representations may have created similar obligations or created the expectation of similar obligations on the part of the insured, and Protective is not willing to accept and assume any such obligation. Therefore, as a condition precedent to the assumption of any policy by Protective under this Agreement, it is agreed that the owner of any Assumed Policy which is participating or in any other way has a claim against the earnings of the issuer thereof expressly must agree, and by failure to reject the Certificate of Assumption as hereinafter provided such policyholder shall be deemed to have agreed to the following reformation, modification and amendment of each such policy with regard to the payment of dividends:

1. If a policy is participating or contains any provision which may be construed to be a claim upon the earnings of the company issuing or assuming the policy or the policyholder of such policy claims any such right for any reason, the following provision shall be substituted for any or all such provisions of the existing policy:

[4884] *Dividends.* Any dividend paid on this policy shall be as declared in the sole and absolute discretion of Protective and no contractual provision or written or oral promise, express or implied, heretofore made to the policyholder shall bind Protective to declare or pay any dividend. Protective may, in its sole and absolute discretion, declare no dividend or a dividend in such amount as it may deem advisable.

2. Each person not expressly rejecting, and thereby accepting, an assumption agreement from Protective pursuant to



the terms hereof shall be deemed to have released Protective (1) from any and all obligation under such policy or otherwise to declare any dividend whatsoever on such policy and (2) any liability for any misrepresentation or fraud of any person with respect to any statement regarding dividends on the policy.

However, the foregoing shall not be construed to apply to the guaranteed minimum of ten dollars (\$10.00) per One Thousand Dollars (\$1,000) "dividend" provided under Form PSIP, the President's Special Investors Plan, issued by Empire Life Insurance Company of America, Little Rock, Arkansas and assumed by Empire, which dividend commitment is in the nature of a pure endowment or coupon benefit and accordingly will be paid by Protective in the same manner as such benefits.

[4885] *B. Contingent Paid-Up Additions.* Protective has no obligation to declare dividends on any participating policy of Empire. If, however, in its sole and absolute discretion, Protective should determine that dividends of some amount should be paid to such policyholders while Moratorium Amounts are still outstanding, it is hereby specifically agreed that Protective may declare contingent paid-up addition dividends prior to the time all Moratorium Amounts are removed as provided in Section VIII.D. above but a declaration of such dividends shall in no respect be deemed to be a waiver by Protective of its right not to declare such a dividend at any time in the future or on any other policies. Such contingent paid-up addition dividends shall provide an increase in death benefit in the event the insured shall die while such contingent paid-up addition dividends are outstanding on the policy. However, in the event the policyholder shall surrender his policy or elect a reduced paid-up or extended term insurance benefit under the nonfor-

feiture provisions of any such policy, the policyholder shall lose all claim on such contingent paid-up additions and Protective shall have no further obligation on account thereof. Such contingent paid-up additions shall cease to be contingent when all Moratorium Amounts have been cancelled on all policies and at that time shall become regular paid-up additions. The determination of equitable treatment between classes of policyholders shall be made in the sole and absolute [4886] discretion of Protective.

*C. Dividends After the Moratorium Period.* Protective agrees that when all Moratorium Amounts have been cancelled, it shall attempt to place any of the Assumed Policies that are then participating on a basis of substantial equity with similar policies issued by Protective at the same time as the Assumed Policy but only with respect to dividends for those years after the amount of the Empire Fund shall exceed the amount of the Empire Liabilities. Such dividends shall be payable only at the sole and absolute discretion of Protective and the policyholder shall be entitled to elect any form of dividend payment option normally available to Protective's participating policyholders; however, if no option election is filed with Protective after the Effective Date hereof and prior to such dividend payment, the paid-up addition option shall be deemed to have been elected. The determination of a basis of substantial equity between classes of policyholders shall be in the sole and absolute discretion of Protective.

*XIII. Assumption Certificates.* Protective agrees that, as promptly as possible after the Effective Date hereof, it shall issue to each policyholder whose policy is reinsured by it hereunder an assumption certificate dated as of the Effective Date

and substantially in form and with the provisions set out in Exhibit "A" attached hereto and made a part hereof [or with such modifications as may be approved by the Receiver], [4887] subject to (i) the written terms and conditions of each such policy, as modified by this Agreement and (ii) any and all offsets, counterclaims, cross-actions and defenses which are now or may hereafter become available to Empire or Protective, and all such offsets, counterclaims, crossactions and defenses held, owned or possessed by Empire are hereby transferred, assigned and conveyed by it and the Receiver to Protective. Such assumption certificate shall be mailed by Protective by first class mail addressed to the policyholder at the address shown upon the records of Empire.

*XIV. Right to Reject Assumption.* It is specifically recognized and agreed by the parties hereto that each of the policyholders of any policy which is the subject of this agreement has a valid claim against the receivership estate of Empire in an amount equal to the Withdrawable Funds of his or her policy. Each policyholder affected by this Agreement shall have the right and privilege of an election either to accept in full the terms of this Agreement and the assumption certificate or to reject the same in full in writing by filing such rejection at the office of John G. Bookout, Receiver, within sixty (60) days after such assumption certificates are mailed to policyholders. All policyholders who have not so rejected this Agreement and the assumption certificate within such period shall be conclusively deemed and considered to have accepted all provisions of this Agreement and the assumption certificate and to [4888] have further agreed that Protective, on behalf of all such policyholders against whose policies and contracts any moratoriums

have been placed, shall have the right to file a claim with the Receiver in the amount of the total of the moratoriums. Any dividend distributions on such claim received by Protective from the Receiver shall be added by Protective to the Empire Fund. It is agreed and understood that Protective shall have no obligation with respect to such claim or the prosecution or collection thereof other than the filing thereof with the Receiver and the acceptance and application, as described above, of any dividend distributions Protective may receive as a result of such claim. Protective agrees to transfer to the Receiver assets equal in value to the assets herein transferred to Protective covering the reserves on policies of such policyholders who may reject this Agreement and assumption certificate within the period specified above, less the applicable Moratorium Amount on each such policy. Any such policyholder rejecting this Agreement and the assumption certificate by giving written notice thereof to the Receiver within such period will be entitled to make his own claim directly to the Receiver and shall receive no benefit under or by virtue of this Agreement.

*XV. Premiums and Other Receipts.* All premiums and payments on any policies assumed by Protective which are paid by the policy owners on and after the Effective Date hereof shall be [4889] the sole property of Protective, and neither the company, nor receivership estate thereof, from which such policies were so assumed shall have any right, title or interest therein. All moneys, checks, drafts, money orders, postal notes, and other instruments received by the Receiver for premiums on the policies assumed under this Agreement and attributable to periods after the Effective Date shall be forthwith transferred and delivered to Protective and any such instruments when so



delivered shall bear all endorsements required to effect the transfer of same to Protective. The Receiver and Protective agree that Protective shall have all of the rights of Empire under outstanding bank draft authorizations from policyholders which authorized Empire to draw on the policyholders' bank accounts to pay premiums on the policyholders' insurance policies transferred by the Receiver to Protective, so far as permitted by the laws of the applicable states, and Protective, as part of this Agreement, assumes the guaranty obligations of Empire with respect only to such bank draft authorizations outstanding as of the Effective Date hereof. Protective shall have the right and authority to collect for the account of Protective all receivables and other items which shall be transferred by the Receiver to Protective and to endorse without recourse and without warranties of any kind the name of Empire on any checks or other evidences of indebtedness received by Protective on account of any such receivables or other items. [4890] Receiver agrees to execute all documents or instruments as may be necessary to assure that any endorsement in accordance with the provisions of this paragraph by Protective of Empire's name shall be recognized and accepted. The Receiver agrees that he will transfer and deliver to Protective any cash or other property that the Receiver may receive with respect to such receivables or other items.

XVI. *Records.* The Receiver agrees to deliver to Protective all of Empire's files and records relating to policies ceded hereunder and assets transferred hereunder. Protective agrees that the Receiver shall be entitled to inspect, audit and copy any and all of such records thereafter if needed to carry out the further duties of the receivership.

XVII. *Arbitration Clause.* All disputes or differences between the two contracting parties arising under or relating to this Agreement upon which an amicable understanding cannot be reached shall be decided by arbitration pursuant to the terms of this section, except that the court of arbitrators for the matters set forth in Section VI.A. of this Agreement shall be constituted as provided therein.

The court of arbitrators provided for herein shall place a liberal construction upon this Agreement in light of the prevailing customs and practices for reinsurance in the life insurance industry, free from legal technicalities, for the purpose of carrying out the intent of the [4891] parties.

The court of arbitrators, which shall be held at the home office of Protective in Birmingham, Alabama, shall consist of three arbitrators who must be officers of life insurance companies familiar with the reinsurance business, other than Protective.

Within thirty (30) days of written demand of either party to arbitrate any dispute arbitrable under this Section XVII, each of the parties shall appoint an arbitrator, notifying the other party of the name and address of such arbitrator. The two arbitrators so appointed shall thereupon select a third arbitrator. If either party shall fail to appoint an arbitrator as herein provided, or should the two arbitrators so named fail to select a third arbitrator within thirty (30) days of their appointment, then, in either event, the President of the American Life Insurance Association or its successor shall appoint such second and/or third arbitrator. The three arbitrators so selected shall constitute the court of arbitrators.

A decision of a majority of said court shall be final and



binding and there shall be no appeal therefrom. The court shall not be bound by legal rules of procedure or evidence but shall establish its own procedures and receive evidence in such a way as to do justice between the parties. The court shall enter an award which shall do justice between the parties and the award shall be supported by written opinion.

[4892] The costs of arbitration, including the fees of the arbitrators, shall be borne by the losing party unless said court shall decide otherwise.

**XVIII. Conditions Precedent.** In addition to any other conditions precedent to Protective's obligations hereunder which may have been hereinabove set forth, Protective shall have the right, in its sole discretion, prior to the Effective Date hereof, to terminate and render void this Agreement, without liability to any person therefor or hereunder, upon the failure of the Receiver to tender or furnish to Protective, no later than five (5) days before said Effective Date, except with respect to (a) which shall be furnished fourteen (14) days before said Effective Date, any one or more of the following:

(a) (i) the Trust Agreement and related documents establishing that the Libbie Shearn Moody Trust is a valid and enforceable trust with a duration at least as long as the life of Shearn Moody and (ii) all documents necessary to show a valid, enforceable and assignable right in Empire to 40% of the life interest of Shearn Moody in one-eighth (1/8) of the income of said trust;

(b) duly executed, legally binding and assignable notes from the policyholders for each policy loan (except premium loans) shown on Empire's books [4893] with the face amount of none of such loans exceeding, except nominally,

the cash surrender value of the respective policy (tender at the Empire home office shall be deemed compliance with this provision);

(c) evidence that all notes and mortgages to be transferred to Protective are valid and binding; evidence of full fire and extended coverage insurance on the real property subject to such mortgages; and evidence of the assignability thereof to Protective;

(d) title binders from approved solvent title insurance companies on all real estate with individual values in excess of \$100,000 to be transferred to Protective sufficient to insure Protective's title in amounts not less than those shown in Empire's 1972 Annual Statement with respect to each parcel of real estate and showing Empire's ownership to be free and clear of all liens and encumbrances except those disclosed in Empire's 1972 Annual Statement;

(e) all equity and debt securities of Empire to be transferred hereunder in form for transfer (except to the extent provided for in Section VII.B. hereof), free and clear of all liens and encumbrances except as disclosed in Empire's 1972 Annual Statement;

[4894] (f) a schedule of all assets to be transferred; and

(g) (i) evidence that the representations of the Receiver contained in Section VII.C.5. are true and (ii) the policies on the life of Shearn Moody referred to in Section VII.C.5. in the full amount stated therein, and forms with all signatures thereon necessary for assignment to Protective as owner and beneficiary as of the Effective Date.

Protective shall further have said right to terminate prior to

the Effective Date upon the occurrence of any of the following facts (or opinion in the case of subparagraph (c)):

(a) that those assets of Empire to be transferred are not those shown in the 1972 Annual Statement or assets of equivalent value substituted therefor, except that certain assets may be or may have been sold under Court order between December 31, 1972 and the Effective Date and the cash proceeds thereof shall constitute part of the \$2,000,000 not to be transferred;

(b) that there has been at any time up to the Effective Date any damage, destruction or loss not fully covered by insurance materially and adversely affecting any assets to be transferred to Protective;

[4895] (c) that, in the opinion of counsel for Protective, the interest in the Libbie Shearn Moody Trust agreed to be transferred is not valid and enforceable for the lifetime of Shearn Moody or is not assignable to Protective by Empire. Protective may, without prejudice to its rights otherwise under this Agreement, waive one or more of such conditions in a separate writing executed by its President.

#### *XIX. Conditions Subsequent.*

A. Protective shall have the right to terminate and rescind this Agreement and the assumption certificates, and upon rescission, Protective shall be absolutely relieved of all of its obligations thereunder, upon the happening of either of the following occurrences at any time within the time periods set forth below:

(i) any timely appeal from any order of the Circuit Court for the Tenth Judicial Circuit of Alabama in Case No. 171-687;

(ii) any lawsuit filed in any court in which a claim is made attacking this Agreement or its validity, whether or not Protective is a party to such lawsuit; provided that such lawsuit is filed within six (6) months of the entry of the final order of the Circuit Court for the Tenth Judicial Circuit of Alabama in Case No. 171-687 approving this [4896] Agreement.

Upon the occurrence of the filing of an appeal as described in subparagraph (i) or a lawsuit as described in subparagraph (ii), Protective shall have fifteen (15) days following written notification to Protective by the Receiver (or any other written notice in fact received by Protective) of the filing of such an appeal or of such a lawsuit to elect to terminate and rescind this Agreement pursuant to this Section. If Protective shall fail to make such election to terminate and rescind this Agreement within said period of fifteen days, its obligations hereunder shall remain in full force and effect notwithstanding any such appeal or lawsuit.

B. In the event that any court shall enjoin or otherwise order or decree (preliminary or otherwise) Protective not to perform any or all of its obligations incurred under this Agreement, for however long as such injunction, order or decree shall be outstanding, Protective shall be absolutely relieved from performing any obligation incurred hereunder to the extent that such performance would result in a violation of any such injunction, order or decree; provided that Protective shall use its best efforts to have any such injunction, order or decree dissolved and set aside.

#### *XX. Other Provisions.*

1. This Agreement shall inure to the benefit of and be



binding upon the successors and assigns of Empire, Protective and the Receiver.

2. All prior or contemporaneous agreements [4897] and representations are merged into this Agreement, which, together with the exhibit hereto, constitutes the entire contract between the parties. No amendment or modification hereof shall be of any force or effect unless in writing and signed by the parties.

3. This Agreement shall be governed by and construed and enforced in accordance with the laws of the State of Alabama, except that it is agreed that the provisions of Section VI.A. and Section XVII, relating to arbitration of disputes hereunder, shall be governed by the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*

4. Nothing herein, express or implied, is intended, or shall be construed, to confer upon or give any person, firm or corporation, other than Protective, Empire and the Receiver, any rights or remedies under or by reason of this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed as of the day and year first above written.

John G. Bookout, Commissioner of  
Insurance, State of Alabama, as  
Receiver for Empire Life Insurance  
Company of America.

ATTEST:

W. C. Brannon  
Secretary

PROTECTIVE LIFE INSURANCE COMPANY  
By Wm. J. Rushton  
President

[4898]

**EXHIBIT "A"****CERTIFICATE OF ASSUMPTION**

INSURED: \_\_\_\_\_

ORIGINAL POLICY NUMBER \_\_\_\_\_

ASSUMPTION NUMBER \_\_\_\_\_

This is to certify that Protective Life Insurance Company, pursuant to a Treaty of Assumption and Bulk Reinsurance (herein "Treaty") between John G. Bookout, Commissioner of Insurance, State of Alabama, as Receiver for Empire Life Insurance Company of America, Montgomery, Alabama, and Protective Life Insurance Company ("Protective"), hereby assumes all liability under the policy described above issued or assumed by Empire Life Insurance Company of America, in accordance with the conditions and terms hereof but subject to the more detailed terms and conditions specified in said Treaty, as of 12:01 A.M., C.S.T., the \_\_\_\_\_ day of \_\_\_\_\_, 197\_\_\_\_, subject to any defenses available to Empire Life Insurance Company of America on said date.

Whereas, Empire Life Insurance Company of America was insolvent as of the effective date of the Treaty and the assets of said Empire Life Insurance Company of America were insufficient to provide all benefits to policyholders and to pay all creditors, the Treaty imposes certain limitations on the rights of the policyholder of the policy assumed hereunder. Acceptance of such limitations by the policyholders is a condition precedent to this Certificate of Assumption becoming effective. [4899] Accompanying this assumption certificate is a summary of the



more important terms of the Treaty affecting the policyholder. Upon written request prior to December 31, 1975, Protective will supply the policyholder with a copy of the complete text of the Treaty, which is on file with the Commissioner of Insurance, State of Alabama. Among the conditions precedent to this assumption is the imposition of a temporary moratorium against the withdrawable values of this policy. The initial amount of the moratorium is 35% of the withdrawable values as of the effective date of the Treaty. This moratorium amount can never increase. The moratorium must terminate, at the latest, fifteen years from the date of the assumption; it may be cancelled prior to that time and under certain conditions may be reduced as often as annually. Such moratorium affects only the cash surrender and loan value, those options and privileges relating to such values (such as conversion, exchange, and partial withdrawal) and nonforfeiture benefits under the policy. Death and endowment at maturity benefits will be paid in full.

As a further condition precedent to the effectiveness of this assumption certificate, if the policy for which this certificate is issued is a participating policy or if for any other reason a claim may be asserted by virtue of said policy against the earnings of Empire Life Insurance Company of America, any predecessor or successor thereto, the Treaty specifically requires that all [4900] such dividend provisions, whether written or claimed to be implied, are amended by substitution of the following:

*Dividends.* Any dividend paid on this policy shall be as declared in the sole and absolute discretion of Protective and no contractual provision or written or oral promise, express or implied, heretofore made to the policyholder shall

bind Protective to declare or pay any dividend. Protective may, at its sole option, declare no dividend or a dividend in such amount as it may deem advisable.

And furthermore it is required that the policyholder acknowledge that by failure to reject the assumption certificate he releases Protective from any claims, whether sounding in fraud, misrepresentation or otherwise, which might have heretofore been made by him or on his behalf relating to any dividend with respect to the policy. All premiums falling due subsequent to \_\_\_\_\_ shall be paid to, and all correspondence relating to this policy should be directed to, Protective Life Insurance Company at its home office in Birmingham, Alabama.

Protective shall have the right to terminate the Treaty and void this assumption certificate if enjoined by court order or if, within six (6) months of the approval of the Treaty, an appeal is taken against any order of the court [4901] which approved the Treaty or any lawsuit attacks the Treaty or its validity.

The policyholder may reject this assumption by filing such rejection in writing at the office of John G. Bookout, Receiver, Department of Insurance, Administration Building, Montgomery, Alabama 36104, within sixty (60) days after this assumption certificate was mailed. As a consequence of such rejection, this assumption shall be void and the policyholder will retain his rights against the receivership estate of Empire Life Insurance Company of America.

IN WITNESS WHEREOF, Protective Life Insurance Company has caused this certificate to be executed in its name and on its behalf by William J. Rushton, III, its President, and

attested by W. C. Brannon, its Secretary, both being thereunto duly authorized.

ATTEST:

W. C. Brannon  
Secretary

PROTECTIVE LIFE INSURANCE COMPANY

By Wm. J. Rushton  
President

**[4902] FIRST AMENDMENT TO TREATY OF  
ASSUMPTION AND BULK REINSURANCE**

John G. Bookout, Commissioner of Insurance, State of Alabama (herein the "Receiver"), in his capacity as Receiver of Empire Life Insurance Company of America, an Alabama corporation, in receivership (herein "Empire"), and Protective Life Insurance Company, Birmingham, Alabama, an Alabama corporation (herein "Protective"), hereby amend the Treaty of Assumption and Bulk Reinsurance between them dated as of May 31, 1974, as follows:

1. The provisions of Paragraph III are hereby stricken and the following provisions are substituted therefor:

The Closing Date of this Agreement shall be June 1, 1974 unless such Date be hereafter extended in writing by Protective.

This Agreement shall not become effective or be binding on Protective in any way unless and until the Receiver shall have accomplished (1) the tender or furnishing of each and every item enumerated in Paragraphs VII D and XVIII hereof within the time limits therein specified as amended and (2) the transfer and assignment to Protective of all of the assets (or cash in lieu of assets) required to be transferred to Protective hereunder on or before the Closing Date. [4903] If the Receiver shall fail to have completely accomplished either (1) or (2) within said time limits, this Agreement shall never become effective and shall be totally null and void. Upon the Receiver's completely accomplishing both (1) and (2), this Agreement shall be effective as of

12:01 A.M., C.S.T. on January 1, 1974, which shall be deemed to be the Effective Date of this Agreement.

However, it is expressly agreed by the Receiver and Protective that during the period between the date upon which this Agreement is approved by the Court and the Closing Date, Protective, to the extent practicable, shall administer the affairs of Empire, invest such investable assets that are transferred to it prior to the Closing Date and otherwise be empowered to act as if the Agreement was closed except as to the provisions of Paragraph XIII, and all actions taken by it in good faith shall be binding on the Receiver in the event this Agreement does not become effective.

2. Paragraph VII A at line 5 on page 14 is amended by striking the words "fifteen year period" and substituting therefor the words "ten year period." Paragraph VIII D (3), line two, is amended by striking the words "fifteen (15) [4904] years" and substituting therefor the words "ten (10) years."

3. The provision at the end of Paragraph VII C (5) beginning with the words "and the Receiver further . . ." in the middle of the fourth line from the end of Paragraph VII C (5) on page 17 of the Agreement and ending with the words "under all such policies" at the end of Paragraph VII C (5) is stricken.

4. Paragraph VII is amended by adding the following as subparagraph D:

*D. Life Insurance*

1. On or before the Closing Date, the Receiver shall transfer possession of each of the insurance policies described in Paragraph VII C (5) above to Protective and shall assign to Protective absolutely and irrevocably the right to receive death

proceeds from such policies in the amount of \$4,350,000 subject only to adjustment as provided in subparagraph D (3) below. Notwithstanding said transfer of possession of the policies, the Receiver shall remain the owner and beneficiary of said policies. Not less than 15 days prior to the Closing Date, the Receiver shall have accomplished all things necessary to: (1) make such assignments of proceeds to Protective in a form and with content acceptable to the issuer of said policies; [4905] (2) receive written acknowledgments from the issuer of notice of assignment; (3) provide for the absolute right by Protective to pay upon non-payment by the Receiver, prior to cancellation of any of such policies, the premiums of any and all of such policies upon written notice by the issuer that the Receiver has failed to pay any such premium; and (4) furnish satisfactory written evidence to Protective of having accomplished (1), (2) and (3).

2. Protective shall have first priority to any and all death proceeds paid under such policies up to the amount of said proceeds assigned to Protective. Should, for any reason, the death proceeds paid under said policies be less than the full face amount of said policies, nevertheless, Protective shall be entitled to and shall receive the whole amount of proceeds assigned hereunder (as may be adjusted) and there shall be no pro rata reduction of the proceeds payable to Protective on account of any failure to pay the entire proceeds of said policies.

3. On or before June 1 of each calendar year after 1974, the Receiver and Protective shall adjust the amount of the assignment of proceeds of said [4906] policies made hereunder so that such assignment equals the then current value



of the interest of Protective in the Libbie Shearn Moody Trust assigned hereunder as reflected in Protective's annual statement for the preceding year filed with the Alabama Department of Insurance plus any retained risk amount by Protective under said policies either as a result of assumption or as a reinsurer.

4. The Receiver shall pay all premiums on such policies and do all things necessary to keep each of said policies in full force and effect at all times. Upon a written statement from the Receiver, Protective shall reimburse the Receiver annually for Protective's pro rata share of such premiums based upon the ratio of death proceeds assigned to Protective to the total death benefits payable under such policies for such year.

5. If Protective, upon non-payment by the Receiver, pays the premiums on any of said policies, the Receiver shall immediately, free of any further consideration, transfer and assign all of said policies to Protective, free and clear.

6. The Receiver agrees to do all things reasonably within his power to [4907] obtain agreement of the National Western Life Insurance Company of Denver, Colorado and of the North America Life Insurance Company of Houston, Texas so that Protective may directly assume the interests of said companies in such policies and acquire from North America all of its rights under treaties of reinsurance relating to such policies between North America and Connecticut General Life Insurance Company and Lincoln National Life Insurance Company.

7. Receiver agrees that should he or the Court decide to reduce or terminate the Receiver's interest in such insurance policies, he shall offer to assign and transfer to Protective free of any further consideration such interest in such policies as both owner and beneficiary as the Receiver or the Court determines should be relinquished and if Protective accepts such offer of transfer, Protective shall thereafter be responsible for all premiums on such policies. It is recognized that any decision by Protective with respect to such additional insurance shall be at its sole discretion, and Protective shall become the sole owner of and be named the sole beneficiary under any such part of insurance assigned. The Receiver shall not assign his interest [4908] either as owner or beneficiary in any of said policies to any third party. Upon termination of the Receivership, the Receiver, upon the election of Protective in its sole discretion, shall transfer, assign and convey his entire interest as both owner and beneficiary of each of said policies to Protective free of any further consideration from Protective to the Receiver. Protective shall thereafter have sole discretion with respect to all matters concerning said policies, including, without limitation, the cancellation or reduction of benefits under said policies but shall also be responsible for all premiums on such policies.

8. No part of this amendment shall diminish the right of Protective under Paragraph XI D (2) to charge any and all premiums paid by Protective on such insurance as an investment expense of Empire. And benefits received under such policies by Protective shall be treated as assets added to the Empire Fund, or as Protective assets if the moratorium created hereunder has expired.

5. Paragraph VII is amended further by adding the following as subparagraph E:

E. The Receiver shall transfer, assign, deliver and convey to Protective all of the assets to be transferred [4909] hereunder on or before the Closing Date, provided that to the extent that the Receiver is, for reasons beyond his power and control, not able to transfer and assign title to one or more of such assets he shall, in lieu of any such asset, pay to Protective on the Closing Date such amount of cash as shall equal the value of any and all assets not transferred as any such asset or assets are valued pursuant to the provisions of Paragraph VII C hereof. Said cash shall be held by Protective in escrow, but upon the Receiver transferring any asset not transferred at closing to Protective within two years from the Closing Date, Protective shall repay the Receiver such amount of said escrow funds as shall equal the value (as determined under Paragraph VII C) of any such asset transferred. Upon the expiration of two years from the Closing Date, any and all such funds in escrow shall vest in Protective absolutely and thereafter it shall have all right, title and interest thereto, and the Receiver shall have no further obligation to transfer the assets whose value is represented by such escrow.

6. Paragraph VIII D (1), line two, is [4910] amended by striking the words "one hundred five percent (105%)" and substituting therefor the words "one hundred eight percent (108%)," and Paragraph VIII D (1), line nine, is amended by striking the words "one hundred two percent (102%)" and substituting therefor the words "one hundred five percent (105%)."

7. The term "Effective Date" is amended to read "Closing Date" in the second line of Paragraph XIII and wherever it appears in Paragraph XVIII.

8. Paragraph XVIII(e) (p. 43) is stricken in its entirety. The last three lines of Paragraph XVIII(g) beginning with the words, "and forms with . . ." are stricken in their entirety.

9. Paragraph XIX A shall be stricken in its entirety and in place of said provision the following shall be added:

A. The parties recognize that this Agreement will be executed pursuant to an Order of the Court in the case of *State of Alabama ex rel John G. Bookout, Comm'r v. Empire Life Insurance Co.*, Case No. 171-687 in the Circuit Court for the Tenth Judicial Circuit of Alabama, In Equity, and the Receiver cannot guarantee that the validity of this Agreement, in whole or in part, or any [4911] order in Case No. 171-687 relating to this Agreement may not be made an issue either in further proceedings in said case, including an appeal, or in other legal proceedings presently pending or hereafter to be filed.

The Receiver is unwilling to condition this Agreement on there being no such appeal or collateral proceeding, but hereby agrees to and shall reimburse Protective from the fund created for the Receiver in Article VII hereof for all expenses, including attorneys' fees up to a maximum of \$15,000 without Court approval and for such amounts in excess of \$15,000 as the Receiver and the Court shall approve, which Protective might incur on or after December 5, 1973 as a result of the protection of its interests, or in cooperation with the Receiver in protecting their joint interests, in Case No. 171-687 or in

any appeal of Case No. 171-687 (whether or not Protective be a party thereto) or in any collateral legal proceeding affecting (i) this Agreement, (ii) any order in Case No. 171-687 or (iii) otherwise affecting the affairs of Empire to which Protective may be a party or, if not a party, have an interest therein.

The Receiver and Protective agree [4912] to cooperate in any legal proceeding in which their interests may be aligned relating to this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed as of this 31st day of May, 1974.

John G. Bookout, Commissioner of Insurance,  
State of Alabama, as Receiver for Empire Life  
Insurance Company of America.

ATTEST:

Wm. C. Brannon  
Secretary

PROTECTIVE LIFE INSURANCE COMPANY  
Wm. J. Rushton  
President

**[4913] SECOND AMENDMENT TO TREATY  
OF ASSUMPTION AND BULK REINSURANCE**

JOHN G. BOOKOUT, Commissioner of Insurance, State of Alabama (herein the "Receiver"), in his capacity as Receiver of Empire Life Insurance Company of America, an Alabama corporation, in receivership (herein "Empire"), and PROTECTIVE LIFE INSURANCE COMPANY, Birmingham, Alabama, an Alabama corporation (herein "Protective"), hereby amend the Treaty of Assumption and Bulk Reinsurance between them dated as of May 31, 1974 ("Agreement"), as follows:

**Recitals**

1. Since Protective submitted the Agreement for acceptance by the Receiver, material developments have occurred with respect to Empire. Specifically, but without limitation, the assignability of Empire's interest in the Libbie Shearn Moody Trust has been questioned in a lawsuit filed by Shearn Moody, Jr. against The Moody National Bank and Empire in the District Court of Galveston County, Texas, and the hearing in the Circuit Court for the Tenth Judicial Circuit of Alabama for approval of liquidation of Empire as recommended by the Receiver and for acceptance of the Agreement, originally set for February 13, 1974, has been postponed until April 8, 1974, pending notification by mail of each Empire stockholder of the hearing. Protective offered the Agreement [4914] on the express condition that it be accepted by the Receiver and approved by the Court on or before January 31, 1974, and it is now apparent that such acceptance and approval cannot occur until after the hearing to be held April 8, 1974.

2. Protective desires to extend the time in which such accep-



tance and approval may be made through June 1, 1974, but only if the Receiver will agree to make appropriate adjustments in the initial Moratorium Amount established in Section VIII of the Agreement if it is determined that events transpiring since January 31, 1974 have adversely affected the condition of Empire and if the Receiver will enter into the other agreements expressed herein.

3. In Section VI of the Agreement, Protective agreed to reinsure the Old National Policies subject to mutual agreement on the terms of such reinsurance. Since submitting the Agreement, the Receiver has insisted that the initial Moratorium Amount with respect to each Old National Policy to be reinsured be determined on the same basis as that of the Empire Policies to be reinsured. The value of assets to be transferred to Protective for the reinsurance of the Old National Policies and the reserves which must be established for such policies have not been determined by the parties, and the Receiver can make no warranty or assurance at this time that sufficient assets can be transferred from Old National to justify an initial Moratorium Amount for the Old National Policies equal to that [4915] of the Empire Policies. The parties therefore desire to make clear that some upward adjustment in the initial Moratorium Amount for all Assumed Policies may have to be made if Protective is to reinsure the Old National Policies with an initial Moratorium Amount equal to that of the Empire Policies.

#### Agreement

NOW, THEREFORE, in consideration of the premises and the respective agreements of the Receiver and Protective herein contained, they hereby agree as follows:

1. The date for acceptance and approval of the Agreement as provided in Section II, p. 2 of the Agreement is extended to and through, but not beyond, June 1, 1974.

2. Immediately upon the acceptance of the Agreement, as amended, by the Receiver and its approval by the Court, but prior to the Effective Date, the Receiver shall transfer to Protective and Protective, as agent of the Receiver, shall assume possession and control of, and dominion over, all of the assets of Empire other than the Receiver's fund created in Section VII of the Agreement. Thereafter, Protective may, on behalf of the Receiver, sell, dispose of, transfer, assign, invest, reinvest, and otherwise manage any and all of said assets, subject only to such restrictions as may be placed upon Protective by the Court by written order. The Receiver shall do all things necessary [4916] or desirable to accommodate Protective's administration of said assets hereunder. Said assets, while in the possession and control of Protective prior to the Effective Date shall not constitute a trust fund and shall not be subject to any laws, rules or restrictions which apply to investment of trust funds. It is expressly agreed that no claim of whatsoever kind will be made against Protective for alleged errors in judgment made in good faith in the management, sale, disposition, and reinvestment of said assets.

It is recognized by the Receiver that the interests of Empire will be best served by allowing Protective to commingle cash and equivalents received upon initial transfer to Protective of Empire assets or from the sale or transfer of Empire assets or from income produced by such assets or policies into fixed income investments (bonds, preferred stock, mortgages and similar investments) made by Protective in the management of its own

funds. Therefore, the Receiver hereby requests and authorizes Protective to commingle such cash and equivalents into Protective's fixed income investments and invest same in the same manner as Protective invests its own funds without segregating Empire's share from that of Protective. The value of Empire's share in such investments made with commingled funds shall be determined as provided in Section IX.B of the Agreement. Should Protective re-transfer Empire assets to the Receiver as provided for herein, [4917] the value of Empire's share in such commingled assets shall be computed as provided in Section IX.B and Protective shall re-transfer to Empire cash and/or fixed income assets (valued at their admitted value to Protective) purchased after transfer of the Empire assets hereunder, selected by Protective in its discretion, equal to the value of Empire's share so computed. Any dispute under the provisions of this paragraph shall be resolved by arbitration as provided in Section XVII of the Agreement.

3. Protective shall assume possession and control of and dominion over all Assumed Policies and, without reinsurance, shall administer all Assumed Policies. Such administration shall be carried out as if the Agreement were fully effective, subject to such modifications as the Court may prescribe, except that Protective shall reinsure no such policy and all payments on such policies shall be as if the Moratorium provisions of the Agreement required an initial Moratorium Amount based on 50% of the Withdrawable Funds of the policies as of September 15, 1972 rather than the 35% of the Withdrawable Funds as of the Effective Date. It is further agreed that unless paragraph 6 of this Second Amendment becomes effective, the initial Moratorium Amount of any Assumed Policy under the Agreement

shall not exceed fifty per cent (50%) of the Withdrawable Funds as of September 15, 1972.

4. To facilitate transfer of said possession, control and dominion under paragraphs 2 and 3 hereof, the Receiver shall transfer such [4918] of Empire's documents, records and other papers to Protective's offices in Birmingham, Alabama as Protective shall request. Protective shall at all times maintain appropriate books, records and ledgers with respect to said assets and policies, which shall be open to inspection of the Receiver or the Court and their representatives at any reasonable time.

Protective shall be empowered to change any and all procedures and records (including, without limitation, those relating to data processing) now in use by Empire as Protective, in its sole discretion, shall deem advisable.

The Receiver shall pay to Protective annually a fee for such administration prior to the Effective Date of the Agreement which (regardless of whether the Agreement otherwise becomes effective) shall be equal to the amount provided Protective after the Agreement becomes effective as set forth in Sections XI.B.5 and 6 and in Section XI.D to the extent the expenses specified in Sections XI.B.6 and XI.D.1 and 2 are not directly paid out of Empire funds.

5. Except as provided in the first four paragraphs of this Second Amendment, all of Protective's obligations under the Agreement as amended are expressly conditioned upon the determination by Protective that Empire's entire interest in the Libbie Shearn Moody Trust, as described in the Agreement, may be validly, lawfully and irrevocably assigned to Protective free and clear of any lawful or equitable claim or restriction. In



making such determination, Protective may rely [4919] exclusively on the opinion of its General Counsel, Cabaniss, Johnston, Gardner, Dumas & O'Neal. Upon such determination made by Protective in writing and delivered to the Receiver and upon the satisfaction in full of all other conditions to the Agreement as twice amended, all of Protective's other obligations under the Agreement shall forthwith become effective.

6. Except as provided in the first four paragraphs of this Second Amendment, prior to any of Protective's obligations under the Agreement as amended becoming effective and binding, Protective and the Receiver shall evaluate changes in the condition of Empire occurring after February 1, 1974, including, without limitation, lapses in premium-paying policies and any changes in the value or nature of Empire assets. If for any reason the condition of Empire has changed adversely from such date so as to justify an increase in the Moratorium Amount, Protective and the Receiver shall endeavor in all good faith to agree on the amount of such increase. If Protective and the Receiver fail to agree either that Empire's condition has changed adversely or on the amount the Moratorium Amount shall be increased, any such dispute shall be submitted to binding arbitration in accordance with the provisions of Section XVII of the Agreement. It is expressly understood that nothing herein is intended to or shall result in reduction of the Moratorium Amount.

[4920] 7. Except as provided in the first four paragraphs of this Second Amendment, prior to any of Protective's obligations under the Agreement as amended becoming effective and binding, Protective and the Receiver shall determine as accurately as then possible the value of assets transferred or to be

transferred from Old National to Protective with respect to the reinsurance of the Old National Policies and the Empire Liabilities, as defined in Section X of the Agreement, on account of such policies. If the fair market value of the assets is insufficient in light of these liabilities on the Old National Policies to provide an initial Moratorium Amount consistent with that established for the Empire Policies, then Protective and the Receiver in all good faith shall seek to agree upon an appropriate increase in the initial Moratorium Amount for all Assumed Policies. If Protective and the Receiver fail to agree either that the value of the assets to be transferred is insufficient for reinsurance of the Old National Policies on the basis of such initial Moratorium Amount or, after such determination of insufficiency of value of assets, upon an appropriate increase in the initial Moratorium Amount, such dispute shall be submitted to binding arbitration in accordance with the provisions of Section XVII of the Agreement. It is expressly understood that nothing herein is intended to or shall result in a reduction in the initial Moratorium Amount as provided in Section VIII.A of the Agreement.

[4921] 8. The Effective Date, which was set as January 1, 1974 in the first amendment, shall be redetermined by mutual agreement of the Receiver and Protective to reflect the date on which all the conditions set forth in the Agreement, the first amendment and this amendment are fully met. If all such conditions, including, without limitation, the condition stated in paragraph 5 of this Second Amendment, are not fully met by March 1, 1975, Protective may, at its sole option, terminate this Agreement effective forthwith and, upon ninety (90) days' written notice to the Receiver, re-transfer possession and control of all Empire assets and Policies transferred to Protective,



in which case all the terms and conditions of the Agreement shall forthwith be void and of no effect whatsoever, it being understood that the fee payable to Protective for administration shall be paid during such ninety day period. If all of such conditions are met prior to March 1, 1975 and if Protective and the Receiver shall fail to agree upon a revised Effective Date, such dispute shall be submitted to binding arbitration in accordance with the provisions of Section XVII of the Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed as of this 31st day of May, 1974.

**JOHN G. BOOKOUT**

John G. Bookout, Commissioner of Insurance,  
State of Alabama, as Receiver for Empire Life  
Insurance Company of America.

ATTEST:

W. C. BRANNON  
Secretary

PROTECTIVE LIFE INSURANCE COMPANY

By WM. J. RUSHTON III  
Its President

[1330] Executed in 3 Counterparts of which this  
is Counterpart No. 2.

**THIRD AMENDMENT TO TREATY OF ASSUMPTION  
AND BULK REINSURANCE**

JOHN B. BOOKOUT, Commissioner of Insurance, State of Alabama, in his capacity as Receiver of Empire Life Insurance Company of America, an Alabama corporation, in receivership, and PROTECTIVE LIFE INSURANCE COMPANY, Birmingham, Alabama, an Alabama corporation, hereby amend the Treaty of Assumption and Bulk Reinsurance between them dated as of May 31, 1974, as follows:

1. The time for acceptance and execution of this Treaty by the Receiver is hereby extended to and through June 24, 1974.
2. It is agreed that this Treaty and each of the three amendments thereto shall be executed in three counterparts, each of which shall be deemed an original.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed as of May 31, 1974.

**JOHN G. BOOKOUT**

John G. Bookout, Commissioner of Insurance,  
State of Alabama, as Receiver for Empire Life  
Insurance Company of America.

ATTEST:

W. C. BRANNON  
Secretary

PROTECTIVE LIFE INSURANCE COMPANY

By WM. J. RUSHTON III  
Its President

**[6714] AGREEMENT TO EFFECTUATE TREATY  
OF ASSUMPTION AND BULK REINSURANCE**

Charles H. Payne, Commissioner of Insurance, State of Alabama, (herein "Receiver") in his capacity as Receiver of Empire Life Insurance Company of America, an Alabama corporation, in receivership (herein "Empire"), Herbert Crook, Ancillary Receiver of Empire for the State of Texas (herein "Ancillary Receiver"), and Protective Life Insurance Company, Birmingham, Alabama, an Alabama corporation, (herein "Protective") hereby enter into the following Agreement (herein "Agreement to Effectuate Treaty") in order to effectuate the Treaty of Assumption and Bulk Reinsurance dated May 31, 1974, as four times amended (herein "Agreement").

1. As used herein, the following terms shall have the meanings set out below and none other:

(a) Words and terms defined in the Agreement shall have the same definition and meaning herein.

(b) "Lawsuits" shall mean those three lawsuits or actions described in paragraph 2 hereof.

(c) "Trust" shall mean Empire's (or the Receiver's or Ancillary Receiver's) entire interest in the Libbie Shearn Moody Trust as described in paragraph VII(C)(5) of the Agreement.

(d) "Insurance Policies" shall mean each and all of those certain insurance policies described in paragraph VII(C)(5)(iii) of the Agreement.

[6715] 2. Pursuant to paragraph 6 of the Second Amendment, the Receiver and Protective have evaluated changes in the condition of Empire occurring after February 1, 1974, and have

determined that the condition of Empire has changed adversely from said date so as to justify an increase in the Moratorium Amount. The Ancillary Receiver concurs in such determination. Specifically, since February 1, 1974, the following has developed:

a. On or about February 11, 1974, Shearn Moody, Jr. filed an action against the Moody National Bank of Galveston and Empire in the District Court of Galveston County, Texas, 122nd Judicial District, No. 122,034, in which Moody sought a declaration that Empire's interest in the Trust could not be transferred to Protective pursuant to the Agreement. Though a judgment was entered by the trial court denying Moody's claim, an appeal from this judgment has been taken by Moody to the Texas Court of Civil Appeals.

b. On January 14, 1975, Scott E. Manley, as attorney for Moody, made demand on Gene D. Wyatt, President of the Moody National Bank which is Trustee of the Trust, to interplead all Trust income due to Empire into the Ancillary Receivership court in Texas. The Moody National Bank as Trustee immediately acceded to the demand of Moody's attorney and filed a Stakeholder's Petition in Intervention in the Ancillary Receivership [6716] action (Case No. 198,374 in the District Court of Travis County, Texas, 53rd Judicial District) depositing therein approximately \$117,000 which is the most recent semi-annual distribution from the Trustee to Empire. No judgment has been entered in said proceeding on said Stakeholder's Petition. As a result, Empire is not receiving the current income from the Trust.

c. On or about February 21, 1975, Shearn Moody, Jr. moved to file a Cross-Claim and Third Party Petition in the



Ancillary Receivership action in which he claimed that (a) under Texas law, Protective had no insurable interest in Moody's life, (b) the proceeds of the Insurance Policies held by Empire which secure the value of the Trust could not be assigned to Protective without Moody's express written consent, and (c) any such attempted assignment would be void. No judgment has been entered in said proceeding on said Cross-Claim and Third Party Petition. The Insurance Policies are an essential prerequisite of the Trust's having any value on the balance sheet of an insurance company, because if Shearn Moody were to die, the Trust which constitutes a life interest only, would be terminated.

3. As a result of these Lawsuits, the Receiver and Ancillary Receiver acknowledge that so long as they are pending, (a) the Receiver cannot transfer clear title to the [6717] Trust as required by the Agreement; (b) the Trust cannot be carried as an admitted asset in any amount on the statutory balance sheet of Empire, or of Protective if transferred to Protective; and (c) the admitted assets of Empire have been reduced by \$4,367,000. This reduction in the value of Empire's admitted assets is a "change . . . in the value or nature of Empire's assets" within the meaning of paragraph 6 of the Second Amendment, and Protective and the Receiver agree that the initial Moratorium Amount shall be increased by approximately twelve percent (12%) of the Withdrawable Funds as a result of this change.

4. No assets will be transferred at this time to Protective with respect to the reinsurance of the Old National policies, and therefore the initial Moratorium Amount is due to be increased pursuant to paragraph 7 of the Second Amendment. Protective and the Receiver agree that the amount of the increase as a

result of the failure of any assets to be transferred to Protective with respect to the reinsurance of Old National policies shall be approximately three percent (3%) of the Withdrawable Funds.

5. In accordance with the foregoing, pursuant to paragraphs 6 and 7 of the Second Amendment and at the request of the Receiver and Ancillary Receiver, the initial Moratorium Amount under the Agreement for all Assumed Policies and separate accounts shall be adjusted to fifty percent (50%) of the Withdrawable Funds as of September 15, 1972 except [6718] that with reference to (a) the United Founders Treaty the initial Moratorium Amount shall be fifty percent (50%) of the Net Reserves under the Treaty as of said date, and (b) separate accounts specified in paragraph VIII (A) (2) of the Agreement the initial Moratorium Amount shall be fifty percent (50%) of the total value of those accounts as of said date.

6. As the increase in the Moratorium Amount pursuant to paragraph 6 is based on the existence of the Lawsuits, upon Final Judgments being rendered in each and all of the Lawsuits which establish without qualification that:

(a) Empire's entire interest in the Trust, as described in the Agreement, may be validly, lawfully, and irrevocably assigned to Protective free and clear of any lawful or equitable claim or restriction, and

(b) the Receiver may lawfully assign to Protective, absolutely and irrevocably, the right to receive death proceeds from the Insurance Policies in the amount of \$4,350,000 (or an adjusted amount in accordance with the Agreement, as amended),

as of the end of that month in which (i) the last of such Final Judgments is rendered or (ii) death proceeds in the amount of



\$4,250,000 from the Insurance Policies are received by Protective, free and clear of any adverse claim, whichever is earlier, the outstanding Moratorium Amount on each Assumed Policy and separate account in force shall be judged by [6719] twenty-four per cent of the initial Moratorium Amount for such policy or account except that for policies which convert to reduced paid-up or extended term status after June 24, 1974, such reduction shall be twelve percent (12%) of the initial Moratorium Amount. Such moratorium reduction shall be effective as of the first of the next succeeding month. As used herein, "Final Judgment" means the final judgment, order, decree or mandate of the highest appellate court (except the United States Supreme Court) to which an appeal may be taken or other recourse had by right or discretion of court, by petition or similar pleading, in any of the Lawsuits.

7. The Receiver for Old National has filed a claim against the Receiver for Empire in the amount of \$800,000 which the Old National Receiver shall assign to Protective for the benefit of the Empire Fund, and which claim the Receiver has reviewed and determined to be a valid and just claim and the Receiver agrees to recommend to the Court that said claim be allowed in full (subject to verification as to amount) on the condition that any and all payments or distributions made on account of said claim (which shall be in the same proportionate share as payments or distributions to other creditors) be immediately credited to the Empire Fund. As of the end of the month in which the first such payment or distribution on account of said claim is received by Protective it shall calculate the reduction in the Moratorium [6720] Amount in accordance with paragraph VIII.D. of the Agreement, as amended, using approximations for values not

readily available except at year end and treating such payment or distribution as an Empire Asset. Such moratorium reduction shall be effective as of the first of the next succeeding month.

8. Notwithstanding the Lawsuits, at closing, the Receiver shall transfer, assign and convey to Protective all of Empire's (or the Receiver's) right, title and interest to and in the Trust and with respect to the Insurance Policies shall do all things required of the Receiver by the Agreement, including, without limitation, paragraph 4 of the First Amendment.

9. If for any reason any court of competent jurisdiction determines that the Trust cannot be unconditionally and irrevocably transferred, assigned and conveyed to Protective, or invalidates or rescinds, in whole or in part, such transfer, and ownership of said Trust reverts to the Receiver (or the Ancillary Receiver), the Receiver and Ancillary Receiver each severally covenants and agrees to and shall transfer, assign and pay to Protective, immediately upon receipt thereof, free and clear of all claims of any and all creditors and of all expenses of administration, all income received by the Receiver or Ancillary Receiver on account of said Trust. If for any reason any court of [6721] competent jurisdiction determines that the death proceeds of the Insurance Policies cannot be assigned directly to Protective as contemplated by the Agreement, as amended, the Receiver and Ancillary Receiver each severally covenants and agrees to and shall transfer, assign and pay to Protective, immediately upon receipt thereof, free and clear of all claims of any and all creditors and of all expenses of administration, \$4,350,000 of such proceeds, or such other amount as may be computed pursuant to paragraph 4(D)(3) of the First Amendment to the Agreement. The Receiver and Ancillary Receiver

specifically agree that the respective receiverships shall remain open for an indefinite period, and as long as may be required, so that all of said income and death proceeds may be transferred and assigned to Protective as and when received by the Receiver or Ancillary Receiver. Any and all transfers and assignments to be made pursuant to this paragraph shall be absolute and unconditional, irrespective of any right of set-off, recoupment or counterclaim the Receiver or any ancillary receiver may claim against Protective.

10. The Receiver and the Ancillary Receiver will each do all things reasonably within his power to procure as promptly as possible an unqualified victory in each of the Lawsuits and in any other lawsuits which might affect, directly or indirectly, the Trust, the Insurance or the Agreement. The Receiver and Ancillary Receiver will cooperate [6722] fully with Protective in the conduct of the Lawsuits and such other lawsuits and will not enter into any settlement negotiations nor settlement agreement respecting any of such Lawsuits without the express written approval of Protective.

11. The effective date of the Agreement shall be January 1, 1975, provided that the Receiver transfers all of the assets and policies due to be transferred to Protective pursuant to the Agreement and this Agreement to Effectuate Treaty and meets all of the conditions of the Agreement, as amended (except those relating to the Trust and the Insurance), on or before April 10, 1975. If the Receiver is unable to make said transfer of all of the assets and policies and meet all of said conditions on or before April 10, 1975, the Effective Date shall be the first day of the month in which said transfer is complete and all of said

conditions satisfied, or such earlier date as may be fixed by Protective.

12. It is expressly understood and agreed that Protective's agreement to reinsure as provided herein is made in consideration of the covenants and agreements of the Receiver and Ancillary Receiver made herein, and specifically, but without limitation, the adjustment to the Moratorium Amount made pursuant to paragraph 6 of the Second Amendment, and that without all of the covenants and agreements of the Receiver and Ancillary Receiver contained herein Protective [6723] would not reinsure the Assumed Policies pursuant to the Agreement, if at all, until all of the conditions of the Agreement, as amended, were met.

13. The Receiver expressly acknowledges that Protective has the right under the Agreement to file a claim against the Empire receivership estate on behalf of all policyholders against whose policies and contracts any moratoriums have been placed in the amount of the total amount of all such moratoriums. The Receiver further acknowledges that such a claim, when filed, will be a valid and just claim and that the Receiver will recommend that it be allowed in full (subject to verification that it is correct as to amount) and paid, provided that such payment shall be made after payment has been made to other creditors, whose claims are allowed, in proportion to the Benefits accorded policyholders under this Agreement as amended and as herein effectuated and that such payment shall not unlawfully discriminate against other creditors whose claims are allowed.

14. This Agreement to Effectuate Treaty is subject to approval of the Court. The Closing Date shall be two days following the date on which this Agreement to Effectuate Treaty may be



approved by the Court. Closing shall take place at 10:00 A.M. in the Board of Directors room of Protective.

15. Any and all disputes or differences between the contracting parties arising under or relating to this Agreement to Effectuate Treaty shall be submitted to arbitration [6724] in accordance with paragraph XVII of the Agreement. Said paragraph XVII is specifically incorporated herein just as if retyped and set out fully herein.

16. This Agreement to Effectuate Treaty shall inure to the benefit of and be binding upon the successors and assigns of Protective and the Receiver and the Ancillary Receiver.

17. All prior or contemporaneous agreements and representations relating to effectuation of the Agreement are merged into this Agreement to Effectuate Treaty, which, together with the Agreement, constitutes the entire contract between the parties. No amendment or modification hereof shall be of any force or effect unless in writing and signed by the parties.

18. This Agreement to Effectuate Treaty shall be governed by and construed and enforced in accordance with the laws of the State of Alabama, except that it is agreed that the provisions of paragraph 15 hereof, relating to arbitration of disputes hereunder, shall be governed by the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*

19. Nothing herein, express or implied, is intended, or shall be construed, to confer upon or give any person, firm or corporation, other than Protective, Empire and the Receiver and the Ancillary Receiver, any rights or remedies under or by reason of this Agreement to Effectuate Treaty.

[6725] IN WITNESS WHEREOF, the parties hereto have

caused this instrument to be executed as of this . . . . day of April, 1975.

CHARLES H. PAYNE

Charles H. Payne, as Receiver for  
Empire Life Insurance Company of  
America

ATTEST:

W. C. Brannon  
Secretary

PROTECTIVE LIFE INSURANCE COMPANY

Wm. J. Rushton  
President

The undersigned Ancillary Receiver, on behalf of him and his successors, concurs in all of the agreements and covenants contained in paragraphs 9 and 10 hereof and shall otherwise be bound hereunder in accordance with the provisions hereof.

HERBERT CROOK

Herbert Crook, Ancillary Receiver  
for Empire Life Insurance Company  
of America, State of Texas